FILE COPY.

Supreme Court U. S.
FILED
OCT 18 1904
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

W. O. JOHNSON, PETITIONER,
v.
SOUTHERN PACIFIC COMPANY. } No. 32.

W. O. JOHNSON, PLAINTIFF IN ERROR,
v.
SOUTHERN PACIFIC COMPANY. } No. 37.

BRIEF FOR PETITIONER AND PLAINTIFF IN ERROR.

W. L. MACKENZIE,
L. A. SHAVER,
JOHN M. GITTERMAN,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

W. O. JOHNSON, PETITIONER,
v.
SOUTHERN PACIFIC COMPANY. } No. 32.

W. O. JOHNSON, PLAINTIFF IN ERROR,
v.
SOUTHERN PACIFIC COMPANY. } No. 87.

BRIEF FOR PETITIONER AND PLAINTIFF IN ERROR.

This is an action for personal injuries, brought here by virtue of a writ of error and of certiorari from the circuit court of appeals of the eighth judicial circuit. By stipulation (pp. 47, 48) the transcript in cases 279 (old number) (certiorari) and 362 (old number) (writ of error) is to be used for both cases, except the portion thereof constituting the writ of error and other proceedings subsequent thereto.

The action was begun on October 6, 1900, in the first judicial district court of the State of Utah, in and for Box Elder County, and was removed to the United States circuit court by the defendant for diversity of citizenship, on October 30, 1900.

The action came on for trial on June 28, 1901, before Judge Marshall and a jury and without putting

the defendant to any proof, but on defendant's motion the court directed a verdict for the defendant.

An appeal was taken from the judgment entered on Judge Marshall's order to the circuit court of appeals for the eighth circuit, and on the 28th of August, 1902, an opinion was handed down in that court which affirmed the judgment in the trial court. From the judgment entered on that decision this court issued, as said above, its writ of error on June 5, and writ of certiorari on June 3, 1903

This brief is filed on behalf of the petitioner, Johnson.

STATEMENT OF THE CASE.

Statement of case.

The plaintiff in error on August 5, 1900, was acting as head brakeman on a freight train of the Southern Pacific Company. The train ran between Carlin, Nev., and Ogden, Utah, on its regular run from San Francisco, Cal. When this through freight train coming east to Ogden arrived at Promontory, Utah, the conductor ordered Johnson, the plaintiff in error, to uncouple the locomotive, go to the cut-off, fetch a dining car standing there, bring it out on the turntable, turn it around, and then couple the locomotive to the train again.

The dining car had been brought that day from San Francisco on an eastbound passenger train, and it was intended to haul it to Ogden, where it would be placed on a westbound passenger train and returned to San Francisco. On account of the eastbound train being some hours late, the train dispatcher ordered it set out

at Promontory to await the westbound train at that point, there not being time to reach Ogden before the departure of that train, and he then ordered it turned around so that the kitchen would be at the rear end, and so that the odors from the cooking would not offend the persons eating in the car. Johnson proceeded to carry out the order of the conductor, who was his superior officer. He cut the engine off, let it back on the cut-off toward the dining car, and endeavored to make the coupling as he had been ordered to do.

The couplers used.

The dining car was equipped with what is known as a "Miller hook" and the tender of the engine was equipped with what is known as a "Janney" or Master Car Builders' coupler. These two couplers would not couple together, and it was necessary, in order to make the coupling, for Johnson to use a link and pin between them. He tried to couple the tender to the dining car, but in making the coupling he was injured after the second attempt. He does not use the expression that the Janney or California coupler was on the tender, but throughout his testimony he continually expresses it that he called for the engine to back up. On page 14 of the transcript he says: "I failed to make it the first time. I gave the engineer the signal to slack ahead and come back the second time, and I failed again." On page 18 he says: "I told him each time to move back." On transcript page 19: "He was not coming back very swift, either. He did not come back until I signaled him to come

back." "Q. He moved back and you failed to make the coupling that time? A. I never made it." (Tr., p. 19.) "Q. And then you made a signal for him to come back the second time? A. And as soon as I gave the signal," etc. (Tr., p. 19.) "Q. You then signaled for him to move his engine off again, so as to enable you to make it; and you then signaled him to come back, so you could make the connection? A. Yes, sir." (Tr., p. 20.) "I put the link in the Miller hook and then attempted to couple on the engine as it backed up." (Tr., p. 20.) The Miller hook and Janney coupler will not couple automatically by impact. (Tr., p. 15.) The third time his left arm was caught between the bumper on the tender and the dining car vestibule bumper, and was so crushed at the wrist that it had to be amputated.

PLEADINGS.

Pleadings.

This is an action for damages for personal injuries.

On October 6, 1900, action was brought by Johnson against the Southern Pacific Company in the first judicial court of the State of Utah, in and for Box Elder County.

The complaint charges that the defendant is a corporation organized and existing under the laws of the State of Kentucky, and at all times thereinafter mentioned, was and is engaged in operating a railroad between California and Utah, and that at all times was and is a common carrier engaged in interstate commerce by railroad, and was on the 5th day of August, 1900, *hauling and using* on its line a certain locomotive

engine, more fully described hereinafter, used in moving interstate traffic.

That Johnson was the head brakeman of a freight train used in moving interstate traffic, and that he was ordered to uncouple the engine before mentioned from said freight train and couple it to a certain dining car, also used in moving interstate traffic, which said dining car was temporarily standing in the company's yard at Promontory, Utah, waiting the arrival of a through train to be taken to San Francisco.

Complaint.

That the said engine was equipped with what is commonly known as a Janney coupler, and that the said dining car was equipped with what is commonly known as a Miller hook, which two distinct kinds of couplers were not couplers which, acting together, would couple automatically by impact, and therefore had to be coupled by hand by a person passing between the ends of said car and engine and uniting the same by means of a link and pin.

That it was the duty of said defendant company to furnish its cars and locomotives with coupling appliances automatic in their character and which would and should couple automatically by impact, and not necessitating the brakeman of said company going between the cars to couple the same, all of which defendant company well knew, as also the condition of said cars in that respect, and is hereinafter set out, and said defendant company negligently and carelessly used, operated, and maintained the

Complaint.

said locomotive and car in such condition for a long period of time before said accident, by reason of which negligence and carelessness plaintiff was injured, as herein set out.

That the said defendant company ordered and directed the said plaintiff to couple the said engine to said dining car, as aforesaid, and in order to do so he was obliged to use a link and pin and pass in between the said dining car and said moving engine, which he did; and while endeavoring to couple together the said engine and dining car with such link and pin, with all due care and without any fault or negligence on his part, his left arm and hand was (*sic*) caught between the said couplers and ends of said dining car and moving engine, thereby bruising and crushing the same and rendering it useless and diseased, and necessitating the amputation of said hand and forearm.

Plaintiff alleges that he was earning $90 a month, was healthy, strong, and able-bodied before the accident which resulted in the loss of his left arm. In his complaint he claimed $20,000 damages.

The defendant removed the action on October 30, 1900, to the circuit court of the United States for the district of Utah, and, on December 11 filed its answer. The material parts of the answer appear below.

Answer.

Defendant admits the first subdivision of plaintiff's complaint, but denies that at the time of the alleged injuries to plaintiff on said 5th day of August, A. D. 1900, said locomotive engine was being used in moving interstate traffic.

Defendant admits that on the 5th day of

August, 1900, plaintiff was acting as head brakeman upon a freight train composed of freight cars and a locomotive engine of said company, which, at and prior to its arrival at said Promontory, was being used in moving interstate commerce, and that on arriving at Promontory plaintiff was ordered and directed to uncouple the said engine from said train, which he did accordingly, and subject to the rules and regulations of defendant was directed to couple the said engine onto a certain dining car, which was standing at the time in the yard of said company in said town of Promontory; but this defendant *denies* that on said 5th day of August, or at the time of the alleged injuries to plaintiff, said dining car was being used in *moving interstate traffic.*

Defendant admits the third subdivision of said complaint.

Defendant denies that, as applied to said engine after it was parted from said freight train and said dining car standing in the yards of defendant at Promontory, and at the time said alleged coupling was attempted, it was the duty of said defendant at or prior to said attempted coupling to furnish said dining car with a coupling appliance, automatic in its character, or which should couple automatically by impact, not necessitating the brakeman going between the cars to couple the same; or that defendant well knew the same, or knew that said dining car had not a reasonably safe and satisfactory coupler upon the end thereof that was to be coupled, or that defendant negligently and

Answer.

carelessly used or operated said dining car then standing in the yards of said company, or that by reason thereof said plaintiff was injured as alleged in said complaint.

Defendant admits that in ignorance of the condition of said dining car it ordered or directed said plaintiff to couple said engine to said dining car, but that plaintiff well knew that it was his duty, nevertheless, to examine the couplings upon the engine and the dining car, and if the same were defective not to obey such order, but report the same to the conductor or yard master.

Defendant denies that when plaintiff was ordered to couple said cars, the couplings of which were defective, it was his duty, or he was obliged to make such couplings, or to use a link or pin, or pass in between the said dining car and said moving engine, or that while endeavoring to couple together said engine and dining car with link or pin, or with due care, or without any fault or negligence on his part, his left arm or hand was caught between the said couplers or ends of said dining car or moving engine, thereby, or by reason thereof, bruising or crushing the same, or rendering it useless or diseased, or necessitating the amputation of said hand or forearm.

Defendant denies that at the time of said alleged attempt at coupling it knew, or with reasonable diligence or care it could have known, of said Miller hook, or that said Miller hook was out of repair; and this defendant alleges that it could only know of such defects

or want of repair through its employees who did the coupling, and it was their duty, as it was the duty of plaintiff, in case of any such defects as alleged, not to make the coupling, but to report such defects to the defendant.

Defendant denies that plaintiff did not know nor had any means of obtaining knowledge that said couplings were out of order. On the contrary, defendant alleges that before attempting to make such coupling it was the plaintiff's duty to examine said couplings to see if they were in good order, to take sufficient time to do so, and in case they were defective to run no risk, but report such defects to defendant.

As to whether or not, at the time of said injury to plaintiff, he was a strong, healthy, or able-bodied man, defendant has no knowledge of or information thereof sufficient to form a belief, and therefore denies the same.

Defendant denies that by reason of any negligence or want of due care on the part of defendant, as alleged in said complaint, or by reason of plaintiff's injuries as described in said complaint, plaintiff was in the hospital two months, or lost the use of his said hand or forearm, or suffered great bodily or mental suffering or expense, or with a likelihood of further expense or suffering by having to undergo another amputation of the arm on account of its shattered condition.

Defendant denies that by the said alleged wrongful act or acts of defendant the said plaintiff is rendered a cripple for life, or is unable to perform manual labor, or has suffered damage

Answer.

thereby in the sum of $20,000, or in any sum whatever.

And for a further and separate answer to said complaint defendant alleges that prior to the said 5th day of August, 1900, said plaintiff had been in the employ of defendant for about six years, about two years as engine wiper, about two years as fireman, and about two years as brakeman upon its said road. That in all these positions, especially in the two last named, the printed rules and regulations of defendant, in its operating department on its said road, were furnished to and received by said plaintiff, and the rules and regulations in force at the time of the alleged injury to plaintiff on August 5, 1900, had, prior to that time, been furnished to plaintiff and he knew and was familiar with said rules. That by these rules it was among other things provided, in reference to employees on defendant's said road, and as governing said plaintiff, as one of its said employees, that "Employees are required to be conversant with and obey the rules and special instructions." "If in doubt as to their meaning they must apply to the proper authority for an explanation." Also the following: "Persons employed in any service on trains are subject to the rules." Also the following: "Great care must be exercised by all persons when coupling cars. Inasmuch as the couplers of cars and engines can not *be uniform in style or strength*, and are liable to be broken from various causes so as to render it dangerous to expose the hands, arms, or persons of those engaged in making couplings, all employees are enjoined before coup-

ling cars or engines to examine and to know the kind and condition of the drawhead, draw-bar, link-and-coupling apparatus, and are forbidden to place in trains any car with a defective coupling until they shall have reported the defect to the conductor or yard-master. Sufficient time may be taken by employees in all cases to make the examination required." Answer.

That, furthermore, in obedience to these printed rules, it had become plaintiff's duty not to make the coupling; to report the defects of the dining-car coupler to the conductor or the yard master, and that plaintiff, in not reporting the defects of the Miller hook on the dining car, contributed to his own injury.

And, finally, for a third and separate defense, that Johnson knew of the printed rules, and defects in the Miller coupler on the dining car, and that he willfully and carelessly assumed the risk of attempting to make such coupling, and that thereby, without any negligence or carelessness of the defendant, he suffered the injuries complained of.

The case came on for trial on these pleadings, and after the plaintiff's testimony had been heard the defendant moved the court to instruct the jury to return a verdict in its favor, for the reason that the plaintiff had failed to make out a case upon its own evidence. The court directed a verdict in favor of defendant. On error to the circuit court of appeals for the eighth circuit, an opinion was handed down on August 28, 1902, sustaining the nonsuit of the court below. (See record, pages 35–46.) It is to reverse these judgments that this case is brought here.

ISSUES OF LAW.

Issues of law.

The questions of law growing out of the foregoing statement of facts considered in this brief are:

1. The court erred in holding that the word "car" as used in said act does not include a tender to a locomotive.

2. The court erred in holding that the Federal safety-appliance act of March 2, 1893, was satisfied when a car, having one type of coupler was used with a vehicle having another type of coupler, though thereby such couplers of different types, when brought together, would not couple automatically by impact, thus rendering it necessary for a brakeman to go between the cars, and in not holding that Johnson did not assume the risks occasioned thereby.

3. The court erred in holding that the dining car was not, at the time of the injury, used in interstate commerce.

4. The court erred in not holding that there were questions of fact proper to be submitted to the jury independent of the applicability of the act of Congress of 1893.

ARGUMENT.

THE COURT ERRED IN ITS FIRST PROPOSITION THAT THE TENDER OF AN ENGINE IS NOT A CAR WITHIN THE ACT.

Couplings.

It was known to the Congress that the greatest number of times when the couplers were to be actively used and come into play would be when the cars were to be moved about by the engine in making up trains and switched about through the yards

or at junction points, and that then the couplers must couple *automatically by impact*, and be uncoupled *without the necessity of men going between the ends of the cars.* It is not too much to say, and an every-day knowledge of every person who has ever heard anything of railroad cars, is sufficient to convince one of this, that locomotive engines enter into the matter of shifting cars about and bring about a coupling of car with car to such an extent that the word car must certainly be assumed to cover a locomotive unless the contrary is expressed, or at least that the tender of an engine is included in the phrase "any car," as was held by Judge Thayer in his dissenting opinion. Couplings.

The opinion of the court below, however, wastes away by the refinements of criticism the safety-appliance act by holding that a locomotive or its tender is not a car for the purpose required by that act, and thus sustains the decision of the court at trial term. In the opinion of the circuit court of appeals it is stated "but the interpolation in this act of Congress, by construction of an ex post facto provision, that it is and ever since January 1, 1898, has been unlawful for any common carrier to use any engine in inter-state traffic that is or was not equipped with couplers coupling automatically, and that any carrier that has used or shall use an engine not so equipped has been and shall be liable to a penalty of $100 for every violation of this provision, is too abhorrent to the sense of justice and fairness, too rank and radical

a piece of judicial legislation, and in violation of too many established and salutary rules of construction to commend itself to the judicial reason and conscience. The primary rule for the interpretation of a statute or a contract is to ascertain, if possible, and enforce, the intention which the legislative bodies which enacted the law or the parties that made the agreement have expressed therein."

Although this act of Congress was approved on March 2, 1893, it did not go into effect at once, but only after five years. By its provisions the Interstate Commerce Commission was authorized, from time to time, after full hearing and for good cause, to extend the period within which any common carrier shall comply with the provisions of the act. Under this clause the railroads obtained two extensions of time, amounting in the aggregate to two years and seven months, altogether seven years and seven months after the passage of the act.

Extensions of time to comply with act.

The safety-appliance act is clearly a remedial one. It prescribes when its provisions shall become effective. Nothing ex post facto can be construed into an act that could not become operative until 1898, and which, as a matter of fact, did not go into effect until August 1, 1900, four days before Johnson was injured, but seven years and seven months after its enactment on March 2, 1893.

Safety-appliance act is remedial.

The United States has no common law, though it has a peace and to some extent a general law appli-

cable, and flowing from those general powers of government granted to the United States. Thus the regulation of Admiralty and Maritime jurisdiction, the punishment of crimes against the revenue, or against the law of nations, all carry with them powers that any government needs to carry out those powers. So in the regulation of commerce, Congress has plenary powers. The defects which had become intolerable, the killing of thousands as an incident of handling inland traffic had to be stopped, and Congress to remedy this passed a statute declaring the public policy of the nation and stated the conditions of coupling in general language so that no excuse for any miscarriage of justice might arise. The objections made by the circuit court of appeals were to the words of the statute, and Congress passed the very words objected to by the circuit court of appeals so as not to render any one form of coupler mandatory; so as not to call into existence a huge monopoly. The general words were used so as to have every class of coupler comply with that section of the act so long as they were in good order when called upon to join car to car, or car to locomotive, namely, to couple automatically by impact.

Purpose of act.

The remedial aspect of this statute—and it is in the highest degree a remedial statute—can not be stated better than in the familiar citation from Heydon's Case (3 Coke, 7):

> "Again, in construing an act of Parliament it is a settled rule of construction that cases out of

Rules for the interpretation of statutes.

the letter of the statute, yet within the same mischief or cause of the making, thereafter shall be within the remedy thereby provided; and accordingly it is laid down that for the sure and true interpretation of all statutes (be they penal or beneficial, restrictive or enlarging of the common laws) four things must be considered:

(1) What was the common law before the making of the act? (2) What was the mischief for which the common [in this case Federal] law did not provide? (3) What remedy has been appointed by the legislature for such mischief? and (4) The true reason for the remedy. And then the duty of the judges is to put such a construction upon the statutes as shall suppress the mischief and advance the remedy to suppress the subtle inventions and evasions for continuing the mischief *pro privato commodo*, and to add force and life to the cure and remedy according to the true intent of the makers of the act, *pro bono publico*. In expounding remedial laws, then, the courts will extend the remedy so far as the words will admit.

In Potter's Dwarris on Statutes and Constitutions, page 234, the principle is laid down that—

> A statute made *pro bono publico* shall be construed in such a manner that it may, as far as possible, attain the end proposed.
>
> (Pierce *vs.* Hopper, Str. 253, is referred to.)

And in the same work it is said in a note, at page 231, that—

> In construing a remedial statute which has for its end the promotion of important and bene-

ficial public objects a large construction is to be given, when it can be done without doing violence to its terms.

Rules for the interpretation of statutes.

And it makes no difference in the application of these rules that the statute has a penal as well as a remedial side.

"Chancery will aid remedial laws," said Lord Keeper Wright, "*though they are called penal*, not by making them more penal, but by letting them have their course." (Ch. Prac., 215; Dwarris on Statutes, 653.) Also quoted in Sedgwick on Construction of Statutory and Constitutional Law (2d ed.), page 309.

> A statute may be penal in one part and remedial in another part. But in the same act a strict construction may be put on a penal clause and a liberal construction on a remedial clause. (Dwarris on Statutes, 655.)
>
> The statute is so penned that the words might possibly admit of two constructions, and therefore it is material to consider whether it is penal or remedial, because there is a well-known difference in the rule of construction as applied to laws of the sort and of the other. Where they are remedial the interpretation is to be liberal, so as best to apply to the end; but a law may certainly be penal in one part and remedial in another, and that is the case here. There is no danger of the liberal construction of the remedial part being extended afterwards to the penal. The distinction has been too long established for any apprehension of that sort. If the clause upon which this case

Rules for the interpretation of statutes.

arises is remedial, which I think it is, the most extensive sense must prevail. (*Hyde* v. *Cogan*, 2 Doug., 702, at page 705.)

A few citations follow. In *Brady* v. *Daly* (175 U. S., 156), a decision by Chief Justice Shaw is quoted:

> The action is purely remedial, and has none of the characteristics of a penal prosecution. All damages for neglect or breach of duty operate to a certain extent as punishment, but the distinction is that it is prosecuted for the purpose of punishment and to deter others from offending in like manner. Here the plaintiff sets out the liability of the town to repair, and an injury to himself from a failure to perform that duty. The law gives him enhanced damages, but still they are recoverable to his own use, and in form and substance the suit calls for indemnity. (*Reed* v. *Northfield*, 13 Pick., 94, 100, 101; 146 U. S., p. 665.)

While in *Huntington* v. *Attrill* (146 U. S., 665) this court quoted with approval the opinion of Stone, J., of Maryland, as follows:

> * * * It may perhaps be enough to say that, in general, all breaches of duty that confer no rights upon an individual or person, and which the State alone can take cognizance of, are in their nature criminal, and that all such come within the rule. But laws which, while imposing a duty, at the same time confer a right upon the citizens to claim damages for its nonperformance, are not criminal. If all the laws of the latter description are held penal in the sense of criminal, that clause in the Constitution which relates to records and judgments is of compara-

tively little value. There is a large and constantly increasing number of cases that may in one sense be termed penal, but can in no sense be classed as criminal.

Rules for the interpretation of statutes.

And, further, on page 667:

> Penal laws, strictly and properly, are those imposing punishment for an offense committed against the State, and which, by the English and American constitutions, the executive of the State has the power to pardon Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal.
>
> The action of an owner of property against the hundred to recover damages caused by a mob was said by Justices Willes and Buller to be "penal against the hundred, but certainly remedial as to the sufferer." (*Hyde* v. *Cogan*, 2 Doug., 699, 706.)

The safety appliance act is not a penal statute in so far as it protects human life and enlarges the remedies of the employee for a disregard thereof, and yet the court below stated:

Opinion of court below.

> Moreover, this is a penal statute, and it may not be so broadened by judicial construction as to make it cover and permit the punishment of an act which is not denounced by the fair import of its terms. The acts which this statute declares to be unlawful, and for the commission of which it imposes a penalty, were lawful before its enactment, and their performance sub-

Opinion of court below.

jected to no penalty or liability. It makes that unlawful which was lawful before its passage, and it imposes a penalty for its performance. Nor is this penalty a mere forfeiture for the benefit of the party aggrieved or injured. It is a penalty prescribed by the statute and recoverable by the Government. It is, therefore, under every definition of the term a penal statute. The act which lies at the foundation of this suit—the use of a locomotive which was not equipped with a Miller hook to turn a car which was duly equipped with automatic couplers—was, therefore, unlawful or lawful as it was or was not forbidden by this statute. That act has been done. When it was done it was neither forbidden nor declared to be unlawful by the express terms of this law. There is no language in it which makes it unlawful to use in interstate commerce a locomotive engine which is not equipped with automatic couplers.

* * * The mischief at which a statute was leveled, and the fact that other acts which it does not denounce are within the mischief, and of equal atrocity with those which it forbids, do not raise the presumption that the legislative body which enacted it had the intention, which the law does not express, to prohibit the performance of the acts which it does not forbid. Nor will they warrant a construction which imports into the statute such a prohibition. The intention of the legislature and the meaning of a penal statute must be found in the language actually used, interpreted according to its fair and usual meaning, and not in the evils which it was intended to remedy, nor in the assumed

secret intention of the lawmakers to accomplish that which they did not express. Opinion of court below.

Again, further on the court says:

> The act of March 2, 1893, is a penal statute, and it changes the common law. It makes that unlawful which was innocent before its enactment, and imposes a penalty, recoverable by the Government. Its terms are plain and free from doubt and its meaning is clear. It declares that it is unlawful for a common carrier to use in interstate commerce a car which is not equipped with automatic couplers, and it omits to declare that it is illegal for a common carrier to use a locomotive that is not so equipped. As Congress expressed in this statute no intention to forbid the use of locomotives which were not provided with automatic couplers, the legal presumption is that it had no such intention, and provisions to import such an intention into the law and to effectuate it may not be lawfully enacted by judicial construction. The statute does not make it unlawful to use locomotives that are not equipped with automatic couplers in interstate commerce, and it did not modify the rule of the common law under which the plaintiff assumed the known risk of coupling such an engine to the dining car.

Now let us see how these views of the circuit court of appeals agree with those enlightened views expressed by this court in *Holy Trinity* v. *United States* (143 U. S., 457).

In that case the only question at issue was whether or not a professional man, brought over to assume the

Rules for the interpretation of statutes.

rectorship of a church in New York City, was included within the terms of the contract labor law. In discussing the question Mr. Justice Brewer said:

> Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy; and *for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body* (our italics). *United States* v. *Union Pacific Railroad* (91 U. S., 72, 79). The situation which called for this statute was briefly but fully stated by Mr. Justice Brown, when as district judge he decided the case of *United States* v. *Craig* (28 Fed. Rep., 795, 798): "The *motives and history of the act are matters of common knowledge* (our italics). It had become the practice for large capitalists in this country to contract with their agents abroad for the shipment of great numbers of an ignorant and servile class of foreign laborers, under contracts, by which the employer agreed, upon the one hand, to prepay their passage, while, upon the other hand, the laborers agreed to work after their arrival for a certain time at a low rate of wages. The effect of this was to break down the labor market and to reduce other laborers engaged in like occupations to the level of the assisted immigrant. The evil finally became so flagrant that an appeal was made to Congress for relief by the passage of the act in question, the design of which was to raise the standard of foreign immigrants and to discountenance the migration of those who had not sufficient means in their own hands or those of their friends to pay their passage.

Rules for the interpretation of statutes.

The court held that, although literally within the terms of the act, common sense would not permit the court to construe said act as applying to the learned professions. So in this case we insist that common sense requires, in view of "contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body," that a locomotive or tender, or any other vehicle, should be considered a car. Every evil which this act was designed to correct was provided for, and, as the title states, the act was to promote safety, etc.

The contract-labor act was much more penal in its character and purposes than the safety-appliance act of March 2, 1893, which had a far more humane and commendable scope, viz., the protection of that class of wage earners who are not allowed to leave their occupation at will, owing to the quasi public character of their work. If in the Holy Trinity case a member of a learned profession, yet an alien, was admitted to this country under that statute, how much more will this court be disposed to favor the validity of a clearly worded enactment, meant to protect the lives and limbs of the youth and manhood of our own country, engaged in the movement of internal commerce by railway.

It was, as stated, to protect a large and important class of the community whose only protection could come from the Congress of the United States, because that body alone could enforce *uniformity* on every system and in every case. No State law could be passed which would protect the brakemen, because their work on every railroad is largely that of handling interstate

Rules for the interpretation of statutes.

traffic, although it may be done within the body of a State. Over this traffiic the particular States have no control, and should the States undertake to legislate on lines different from those of the National Government, it would make conditions much worse than before. As the court said in the Trinity Case, "A statute must not be construed to be absurd." Again, it must be remembered that the safety appliance act makes it unlawful for "any such common carrier to haul or permit to be hauled or *used on its line* any car used in moving interstate traffic not equipped with couplers coupling automatically by impact."

Every word of an act must be used to aid in giving effect and here it is forbidden (a) to haul, (b) to permit to be hauled, and (c) or to be used on its line, all carefully stated general conditions of service for the relief and aid of trainmen engaged in interstate commerce. The primal object of the act is to save life and limb. The principal method is that it forbids any person to go between the ends of the cars either in coupling or uncoupling cars. That is the gist of the act, and that is *not a penal object* or intended to bring about the punishment or restrict the operation of commerce, but, on the contrary, to extend the operation and to save the lives and limbs of the men in doing it. This court, which investigated so carefully the acts of the colonies and the debates of the Congress and the committee's report to aid it in arriving at a decision whereby a professional man, yet an alien, was admitted to the United States, will certainly sedulously investigate the draft and committee reports and debates which

culminated in the safety-appliance act of March 2, 1893, for the relief of railroad men, and will find in them no scintilla of evidence to support the contention that this act aimed to either increase the revenue or punish the railroad companies for violating the act, as it intended to create and call into being general conditions of service saving the lives and limbs of railroad employees and promoting the safety of the traveling public.

Automatic couplers.

As the coupling of the tenders of locomotives to cars is far more frequent than that of freight cars amongst themselves, it follows that the legislature intended that all couplings should be made without the requirement of men going between the cars. It was unnecessary, however, for them to have stated "the tenders of locomotives," etc., for the reason that when the car engaged in interstate commerce was attempted to be coupled to any other vehicle, locomotive, or anything else, unless that vehicle had a coupler that would couple automatically with the coupler on the car, it rendered the coupler on the interstate car inoperative and therefore not in compliance with the statute because it would not couple automatically by impact. So, too, a car used exclusively in State commerce could not be used unless it had a coupler upon it which would couple with a car used in interstate commerce, because it rendered the interstate-commerce coupler inoperative and therefore not in compliance with the law. So we have this decision of the Trinity Church case as a guide for the interpretation of this great remedial statute, and it points conclusively away from any such

narrow interpretation as that indulged in by the circuit court of appeals.

Voelker case.

Indeed, the circuit court of appeals, in the eighth circuit, which decided this case, seems to have later determined that this particular statute in question is a remedial and not a penal statute, as is shown in the case of *C., M. & St. P. Ry. Co.* v. *Voelker*, decided March 26, 1904 (129 Federal, 522), in which the following language is used:

> Obviously, the purpose of this statute is the protection of the lives and limbs of men, and such statutes, when the words fairly permit, are so construed as to prevent the mischief and advance the remedy. The mischief to be prevented rested quite as much in the act of coupling as in the act of uncoupling. Science had offered, and practical use had approved, a remedy applicable not alone to the act of uncoupling, but also to that of coupling. The two statutes, Federal and State, seem to have been enacted in pursuance of a common purpose to afford a remedy as broad as the mischief and to remove the source or cause of the latter through the compulsory adoption and use of a new system of coupling and uncoupling which dispensed with the necessity of anyone going between, or at least entirely between, the cars.

In this opinion Judges Sanborn and Thayer both concurred, and it is not difficult to read in connection with the words coupling and uncoupling throughout this quotation the words "cars and engine," and the same reasoning, it seems to us, applies.

We insist, as was said by Judge Thayer, in his dissenting opinion in this case in the court below, that— Thayer, C. J., dissenting.

> In my judgment it is a very technical interpretation of the provisions of the act in question, and one which is neither in accord with its spirit nor with the obvious purpose of the lawmaker, to say that Congress did not intend to require engines to be equipped with automatic couplers. The statute is remedial in its nature; it was passed for the protection of human life, and there was certainly as much, if not greater, need that engines should be equipped to couple automatically, as that ordinary cars should be so equipped, since engines have occasion to make couplings more frequently. In my opinion, the true view is that engines are included by the words "any car" as used in the second section of the act. The word "car" is generic, and may well be held to comprehend a locomotive or any other similar vehicle which moves on wheels; and especially should it be so held in a case like the one now in hand, where no satisfactory reason has been assigned or can be given, which would probably have influenced Congress to permit locomotives to be used without automatic coupling appliances. See also *Fleming* v. *Southern Railroad* (131 N. C., 476).

JOHNSON WAS DEALING WITH A TENDER, WHICH IS A CAR.

As shown on pages 4, 5, and 6 of petitioner's other brief, the Janney coupler with which Johnson was trying to make a coupling was on the rear end of the tender, and we insist that the tender is a car within meaning of the act of Congress.

Winkler case. As was said by Mr. Chancellor Boyce, of the supreme court of Delaware, in his opinion in the case of *Philadelphia and Reading Railway Company* v. *George E. Winkler*, reported in 4 Pennewell Delaware Reports, page 387:

> Applying to this case the principle thus announced, we are of the opinion that the court below correctly charged that "Should you find that the tender at the time of the accident was equipped with automatic couplers, but that it was so connected with the bull-nose coupler that the coupling with other cars was not made automatically by impact, but so equipped that it made it necessary for men to go between the ends of the cars to couple and uncouple, then such coupling did not comply with the act of Congress and was unlawful."

Larrabee case. Reliance will probably be placed for support of the proposition that a tender is not a car within the meaning of this act upon the case of *Larrabee* v. *New York, New Haven and Hartford R. R. Co.* (66 N. E. Rep., 1032; 182 Mass., 348), in which Mr. Justice Holmes says:

> The court is of the opinion that the ruling requested should have been given. *It may be, as some of us think, that the rear end of the tender is within the policy and object of the act*, but the word "car" in its ordinary use and acceptance does not include it. On the contrary, it excludes the tender as obviously as it does the engine. It always is dangerous to give unusual meanings to the words of a document on the strength of an imagination of what

> the writer had in mind. Moreover, the other language of the section indicates that, whatever the evil which the legislature sought to prevent, it had in mind only cars properly so called. The prohibition "no railroad corporation shall haul" hardly would be so expressed if it had in conscious view not merely the cars which are regarded as the inert objects of traction by a separate engine from which they are detached daily, but also the tenders which are so much more closely associated with the source of power as almost to be regarded as one with it, and which only exceptionally and with more or less difficulty are taken apart from it.

Larrabee case.

In regard to this decision we respectfully suggest to the court that the learned justice had in mind, in rendering such decision, the words of the statute "haul or permit to be hauled," and that the further words "or used on its line" escaped his attention. In order to give each word of this section a meaning it is difficult to conceive what meaning the word "used" has in this connection; that is, the coupling of cars which includes necessarily the idea of cars being moved, unless it was meant to cover just such evasions or attempted evasions of the policy and objects of the act, as the exclusion of the tender from the words "any car," would permit. For instance, if a railroad company were to find itself encumbered with cars which were not properly equipped, if such a strict construction were to be adopted as to the words "haul or permit to be hauled," it might cause its locomotive to be attached at the rear end of the train and push the

Larrabee case.

same, and could then insist that it was not hauling or permitting to be hauled any cars. Unless this word "used" is meant to cover just exactly such cases, we do not see what force or meaning it has in the section, and, if it is meant to cover such cases, then, of course, the reasoning of the learned justice fails.

We also respectfully suggest that the learned Justice has given an entirely too restricted meaning to the word "haul" as used in said section. If we follow his reasoning correctly he lays down the premise that the tender is not being hauled and that, therefore, it is not one of the cars referred to in the section. We respectfully submit that the definition as given by the dictionary of the word "haul" is "To transport by pulling or drawing, as cars" and "To pull or draw with force." It is evident that the tender does no hauling and is furnished with no force with which to do hauling, but, on the contrary, is hauled itself, but, being a car, what possible difference can it make whether it is continually used in connection with a locomotive or should be treated as any other car and might occasionly be set out on the side track by itself?

As indicative of the interpretation put upon the law by the railroads themselves, when they petitioned the Interstate Commerce Commission for additional time within which to meet the requirements of the law, they included among other equipment their locomotives as requiring automatic couplers and did actually in fact equip their tenders.

All the various authorities, such as technical and common dictionaries, in defining the word "tender"

state it to be a *car* which carries coal and water, or fuel and water, for the locomotive. Webster defines a tender as "A *car* attached to locomotives to supply them with fuel and water while making a trip." The statute says "*any* car" and does not except such cars as are attached to the locomotive, although Congress could have said so, consequently in order to give effect to every word of the statute the intention of Congress must have been to include in the term "any car" such car as is attached to a locomotive, although not a part thereof. A tender is a car.

This is general scientific usage, as the specifications for locomotives in great international expositions, at shops, in catalogues, in scientific publications, all speak of locomotives as complete entities by number of driving wheels, and add as a separate item the height and weight of tenders. They show as distinctly as does popular usage that the tender is not a locomotive, but is a car attached to a locomotive. But as it is a separate and separable thing and as it is not a locomotive it must be a part of the category "any car." The tender is no part of the locomotive. (See cuts in Webster, 1903, Knight's New American Mechanical Dictionary, Encyclopeda Americana, Spohn's Dictionary of Engineering, and American Educational Chart No. 2 of Railway and Locomotive Engineering, 174 Broadway, New York.)

It is held by the Interstate Commerce Commission that a tender is a car when estimating the 50 per cent of air-braked cars which the second section of the

A tender is a car.

amended safety-appliance act requires in a train, and, in meeting the requirements of the law in regard to such 50 per cent, it is understood the railroads regard a tender as a car. For instance, if there were 20 cars in a train it would be sufficient if 9 cars and the tender were equipped to comply with the law.

What would the court say about the practice of those Western railroads, which, in crossing the Great Desert, find it necessary to employ two, and sometimes three, water cars in addition to the ordinary tender? Under such circumstances, would this or any court say that the additional tenders used would not be cars, and fall within the provisions of the safety-appliance act?

The circumstance that so simple a question as this can call forth a discussion seems to make it reasonable to assume that the question is material, and should the court decide that this question is a question of fact, it required submission to the jury.

Admission that tender is car.

The defendant's theory of its case was that the tender was a car—no doubt of that, if the eighth page of the record is read, where the answer of the Southern Pacific Company states:

> Defendant denies that when plaintiff was ordered to couple *said cars*, the coupling of which *were* defective, it was his duty, etc.

This is an unequivocal admission that the tender is a car for the purposes of this case, and for that the pleadings are alone to be considered. A discussion, therefore, of this question can lead to no fruitful result,

since in the Larrabee case the issue was whether or not the tender with a link and pin coupler was a car, whereas in this case the defendant company has admitted that very point by its answer. Admission of defendant.

Since on defendant's motion the case was kept from the jury it can not take advantage of the astute injection of a defense first raised on its behalf in the opinion of the circuit court of appeals. That is not the method prescribed by law to set up defenses and to raise issues. As far as this case is concerned, the defendant company elected to stand and try its case on the theory that the tender of the locomotive was a car, otherwise its pleading is meaningless and absurd.

If *either* the engine or the dining car *was used* in interstate commerce the railroad company assumed the risk of the coupling after August 1, 1900. After that date the risk was the road's, not Johnson's.

Who controls the operation of coupling when a car equipped as directed by a State is being coupled with a car equipped in conformity with the Federal law, when such couplers are of different types? We contend that it is immaterial whether the act of Congress applies to engines or not. The attempt to couple the dining car, which was engaged in interstate traffic, to anything to which it would not couple by reason of being equipped with couplers which would not couple automatically by impact was the *causa causans* of the injury.

Baugh case.

If either one of the vehicles was so equipped that the two would not work together without the necessity of men going between the cars, it necessarily follows that neither of the equipments would couple automatically by impact, as required by the statute. Bearing in mind that the law takes no account of the style of coupler used, but only aims at creating a condition which will prevent the necessity of men going between the cars, the violation of that law grows out of the attempt to couple a car used in interstate commerce with a tender (for the convenience of the railroad) when neither one is equipped for that service. The responsibility for such violation can not be escaped upon the theory that the tender was not required to be so equipped. That might be important if it was a question of coupling two tenders together, but unless the law is made to read "coupling automatically *with other cars used in interstate traffic*" it can have no force here. As was said by Mr. Justice Brewer in *B. & O. R. R.* v. *Baugh* (149 U. S., 378):

> As it passes from State to State, must the rights, obligations, and duties subsisting between it and its employees change at every State line? If to a train running from Baltimore to Chicago it should, within the State of Ohio, attach a car for a distance only within that State, ought the law controlling the relations of a brakeman on that car to the company to be different from that subsisting between the brakeman on the through cars and the company?

If the law had been construed by the railroad managers in the way in which the circuit court of appeals construed it, the number of those killed and injured would have been largely augmented, for the cars are hauled all over the country indiscriminately in State and interstate traffic, and if they had put an entirely different device on cars engaged in State traffic, and had used them, as they would have been used, together with cars engaged in interstate traffic, it would have made confusion worse confounded, and the number of deaths and injuries would have increased instead of diminishing.

Effect of opinion of court below.

THE COURT ERRED IN HOLDING THAT BOTH COUPLERS BEING AUTOMATIC, BUT NOT COUPLING BY IMPACT, SATISFIED THE STATUTE.

After making a statement that at common law "the plaintiff assumed the risks and dangers of the coupling which he endeavored to make, and for that reason he is estopped from recovering the damages which resulted from his undertaking," and reviewing and setting out those sections of the safety-appliance act of March 2, 1893 (27 Stat. L., chap. 196), the circuit court of appeals states its position in the following words:

> The first thought that suggests itself to the mind upon a perusal of this law, and a comparison of it with the facts of this case, is that this statute has no application here, because both the dining car and the engine were equipped as this act directs. The car was equipped with

Application of act.

> Miller couplers which would couple automatically with couplers of the same construction upon cars in the train *in which it was used to carry on interstate commerce* [italics ours], and the engine was equipped with a power driving wheel brake such as this statute prescribes.

The words which change the safety-appliance act are "*which would couple automatically with couplers of the same construction*," a provision not found in the act.

The words of the statute are:

> It shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling *automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.*

Automatically by impact.

Comparing the words of this statute with the words which the court uses the following discrepancy is seen to result: The act says they shall couple *automatically by impact*, and the statute is only obeyed when the couplers on the cars are in good condition. Whenever, therefore, by lack of inspection or some breakdown the mechanism does not work, or for any reason whatever men are required to go between the cars to couple them, then and in that case the statute is violated, and, to quote the statute (section 8), "any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provisions of this act shall not be deemed thereby to have

assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge." And there was ample reason for this, and the wording of this section was most carefully debated in the Congress.

Requirements of act.

The act does not require "automatic couplers," but calls for "*couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars.*" In other words, it makes it a necessity that the cars must have couplers that couple *automatically by impact.* The statute does not require cars to be equipped with automatic couplers. Couplers are never automatic *per se*, that is, they are automatic only in action and in relation to the other couplers with which they come in contact, and actually automatic when in the conditions of service they couple with other couplers without men being forced to go between the cars either to couple or uncouple; hence the words of the statute, "to couple automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars."

The court below uses the following language, relieving the defendant from the requirement of interchangeability of couplers:

> For the reasons which have been stated, this statute may not be lawfully extended by judicial construction beyond the fair meaning of its language. There is nothing in it which requires

a common carrier engaged in interstate commerce to have every car on its railroad equipped with the same kind of coupling, or which requires it to have every car equipped with a coupler which will couple automatically with every other coupler with which it may be brought into contact in the usual course of business upon a great transcontinental system of railroads. If the lawmakers had intended to require such an equipment it would have been easy for them to have said so; and the fact that they made no such requirement raises the legal presumption that they intended to make none. Nor is the reason for their omission to do so far to seek or difficult to perceive. There are several kinds or makes of practical and efficient automatic couplers.

Some railroad companies use one kind; others have adopted other kinds. Couplers of each kind will couple automatically with others of the same kind or construction. But some couplers will not couple automatically with couplers of different construction. Railroad companies engaged in interstate commerce are required to haul over their roads cars equipped with all these couplers. They can not relieve themselves from this obligation or renounce this public duty for the simple reason that their cars or locomotives are not equipped with automatic couplers which will couple with those with which the cars of other roads are provided, and which will couple with equal facility with those of their kind. These facts and this situation were patent to the Congress when it enacted this statute.

Opinion below.

It must have known the impracticability of providing every car with as many different couplers as it might meet upon a great system of railroads, and it made no such requirement. It doubtless knew the monopoly it would create by requiring every railroad company to use the same coupler, and it did not create this monopoly. The prohibition of the statute goes no farther than to bar the handling of a car "not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the car." It does not bar the handling and use of a car which will couple automatically with couplers of its kind because it will not also couple automatically with couplers of all kinds, and it would be an unwarrantable extension of the terms of this law to import into it a provision to this effect. *A car equipped with practical and efficient automatic couplers, such as the Janney couplers or the Miller hooks, which will couple automatically with those of their kind, fully and literally complies with the terms of the law, although these couplers will not couple automaiically with automatic couplers of all kinds or constructions.* The dining car and the locomotive were both so equipped. Each was provided with an automatic coupler which would couple with those of its kind, as provided by the statute, although they would not couple with each other. Each was accordingly equipped as the statute directs, and the defendant was guilty of no violation of it by their use.

The above-quoted language discloses a total misapprehension on the part of the court of the scope and purpose of the law and the intent of the Congress in its enactment. Had the court below been informed as to the history of this legislation it would have known that the very language of the statute, which is quoted in support of its opinion, was adopted by the Congress, only after discussion, for the purpose of bringing about the condition which seems abhorrent to the court, namely, *complete uniformity and interchangeability of couplers* on all railroads engaged in interstate commerce. That was the very thing that the Congress had in view when it enacted this legislation.

Uniformity and interchangeability.

The condition which existed when Johnson was hurt was fully understood and appreciated at the time the act was passed. As was stated in the Senate during the debates attending the passage of the act, the question of uniformity in couplers being under consideration, "*How does that meet the difficulty that the railroads using their best endeavor at the present time, this best endeavor being used on different roads, reach different conclusions on different roads? Road A, using its best endeavor, reaches one conclusion and puts in one form of appliance; road B, using its best endeavor, puts in another form of appliance. If these two appliances brought together, because of their want of uniformity, beget fatality to human life, does the argument of best endeavor remove that difficulty?*"

Here was a railroad company undertaking to use two different types or styles of couplers together,

necessitating the use of the deadly link-and-pin to effect the coupling. A study of the history of the conditions will clearly develop the fact that it was not the so-called deadly link-and-pin that railway employees were protesting against, but it was the increasing casualties due to the lack of uniformity and interchangeability of the couplers in use before the enactment of the law.

Years previous to the passage of the law the Master Car Builders' Association, representing practically all the railroads in the United States, had adopted a uniform type of coupler which would work interchangeably with all other couplers of the same type, but while the railroads had adopted what is known as the Janney or Master Car Builders' Coupler as a standard type, it was not coming into general use as fast as the necessities demanded, for, during the transition period, men were required to go between the cars to couple and uncouple at a much greater hazard than before.

The interpretation of this law by the Interstate Commerce Commission, to whom was intrusted the extension of time to the railroads for "good cause," with respect to the necessity for uniformity is shown by the following quotations from its annual reports:

Uniformity.

UNIFORMITY IN COUPLERS.

[Fifth Annual Report, 1891.—Appendix G.

> One of the chief causes of the deaths to railroad trainmen in the pursuit of their occupation may be attributed to the great variety of couplers used in coupling cars. * * * The justice of the demands of the railroad employees

Uniformity.

for uniformity in safety appliances, more particularly in car couplers, can not be questioned, and can better be appreciated when the difficulties which the trainmen encounter daily and hourly in coupling and uncoupling cars is understood. Under existing conditions, when there are so many couplers in use, it is impossible for men to know before going between the cars whether they have the ordinary links and pins to couple together, or two different types of the large variety of couplers now in use. No matter what coupler is used, no matter how perfect its mechanism and working, if it does not couple as well and as freely with every other coupler now in use as it will with another coupler of its own make, it is to that extent a death trap. What the railroad employees of the country demand is uniformity. They want all couplers alike, and they are the men whose lives and persons are at stake, for with about a million freight cars in use the change to any particular coupler must cause a great injury to their number, and loss of life in bringing it about. This great element of uncertainty, coupled with the danger to life and limb in consequence of such uncertainty, should be remedied, so that trainmen when coupling and uncoupling cars may know that the *couplers will be of the same type.*

[Sixth Annual Report, 1892, pages 69 and 70, text of report.]

It should not be lost sight of that the end to be attained is uniformity in railway safety appliances. * * * The desirability of securing uniform appliances is not only insisted upon

Uniformity.

by the employees, but is conceded by most railway managers, and an effort has been made by the railroads themselves to secure this result. But the predilection of different managers for one or another style of coupler or other appliance, and the disposition of each company to insist that no particular pattern shall be adopted as the standard, make it extremely difficult to secure uniformity by the voluntary action of the railways.

[Seventh Annual Report, 1893, page 76. After the passage of the act.]

In the matter of couplers the aim of the law is that the men shall not be required to go between cars in order to couple or uncouple them, and *therefore a road must not only equip its own freight cars with couplers that are interchangeable, but can not use upon its line the cars of other roads which do not automatically couple with their own.*

[Tenth Annual Report, 1896, page 94.]

Many of the couplers claimed to be automatic only couple automatically with those of the same pattern or type, and not with the couplers in more general use. *Equipment of cars with this class of couplers will apparently compel the owning carriers to confine their use to roads using similar types and to trains composed entirely of cars so equipped.*

[Sixteenth Annual Report, 1902, page 61.]

Plainly, if carriers use different types of couplers which do not work automatically with each other, the law is violated when a carrier

undertakes to haul two cars so equipped in the same train. This was pointed out by the Commission in its report to Congress for the year 1893, and has been generally understood and followed by carriers throughout the country.

Extensions of time.

It is inconceivable that the Interstate Commerce Commission would have granted extensions of time within which to comply with the law if it had held a view similar to that expressed by the circuit court of appeals in the following language:

> For the reasons which have been stated, this statute may not be lawfully extended by judicial construction beyond the fair meaning of its language. There is nothing in it which requires a common carrier engaged in interstate commerce to have every car on its railroad equipped with the same kind of coupler, or which requires it to have every car equipped with a coupler which will couple automatically with every other coupler with which it may be brought into contact in the usual course of business upon a great transcontinental system of railroads.

The statistics which the Commission was annually compiling showed an increasing or diminishing number of fatalities in proportion to the attainment of complete uniformity and interchangeability (see Appendix) to attain which condition the railroads were petitioning the Commission for more time. *The railroads were striving to do the very thing which the court below says they were not required to do.*

The circuit court of appeals lays down a requirement of law which, if it exists, is more honored in the breach than in the observance, when it announces that—

Equipment.

> Railroad companies engaged in interstate commerce are required to haul over their roads cars equipped with all these couplers. They can not relieve themselves from this obligation or renounce this public duty for the simple reason that their cars or locomotives are not equipped with automatic couplers which will couple with those with which the cars of other roads are provided, and which will couple with equal facility with those of their kind.

This varies from the actual methods of interchange in use between railroads and seems odd to everyone who is familiar with the subject. Only an entire failure to have understood the true situation could have misled the court into making such an announcement, for railroads have well-defined rules of interchange which have existed for nearly a generation, and no road will haul a car of any other road unless it is acceptable to them in the matter of equipment. If the equipment or the application of appliances on any car did not comply with the rules of interchange a railroad company would or could decline to accept the car from the connecting carrier.

A railway company is not, as a carrier of freight and passengers, under any obligation to take freight from a connecting road in the cars of the latter and transport it in such cars while its own cars are not in

use, in the absence of any controlling custom among railroads.

Oregon Short Line & U. N. R. Co. v. *N. P. R. Co.* (51 Fed. Rep., 465).

Interstate Commerce Commission, in the case of *Michigan Congress Water Co.* v. *Chicago and Grand Trunk Railway Co.* (2 I. C. C. Rep., 594), held that a railroad company, as a common carrier, has a right to refuse to transport any car which is in an unsafe condition.

Duty of carrier.

It is one of the duties of a railroad company as a common carrier to receive and transport over its line of road cars of other companies, if the gauge of the road is suitable, and the cars are not defective or out of repair, or of such unusual and peculiar construction as to be unreasonably hazardous or dangerous to work with or handle. *Chicago, etc., R. Co.* v. *Curtis* (*Neb.*), (71 N. W. Rep., 42).

Where companies controlling connecting lines of railway transport over their respective lines loaded freight cars of the other, under a traffic arrangement by which they share the earnings, and one company delivers to the other, to be transported over its line, a car that is so defective in its equipment as to be dangerous to handle, and which should have been inspected and repaired before being so delivered, and in consequence of such defective condition of the car an employee of the latter company receives an injury while handling it in the course of his employment, the negligence of the former company in delivering the car for transporta-

tion without proper inspection and repair is the proximate cause of the injury, although the employer company should also have made an inspection of the car when it was received, and was negligent in that duty; the negligence of the latter company, while contributing to produce the injury, is not an independent cause, breaking the casual connection between the injury and original negligence of the company furnishing the car for transportation; and either company, or both, may be held responsible, at the election of the party injured. *Pennsylvania R. Co.* v. *Snyder* (Ohio, 1896), (45 N. E. Rep., 559.) Duty of carrier.

A railroad company is not required, as a common carrier, to take a circus train, a part of which is loaded with wild animals, and transport the same over its line, but may refuse to transport such train, except under a special contract limiting its liability to that assumed by a private carrier.

Wilson v. *Atlantic Coast Line R. Co.* (129 Fed. Rep., 774). (Citing with approval the case of *Chicago N. & St. P. R. R. Co.* v. *Wallace*, 66 Fed. Rep., 506, decided by the circuit court of appeals.)

Said Mr. Justice Harlan in the case of *Baltimore & Potomac Railroad Company* v. *Mackey* (157 U. S., 72, 91):

> We are of opinion that sound reason and public policy concur in sustaining the principle that a railroad company is under a legal duty not to expose its employees to dangers arising

from such defects in foreign cars as may be discovered by reasonable inspection before such cars are admitted into its train.

The Southern Pacific Company, for years before the passage of the law, had made it an invariable rule that unless cars were equipped with air brakes or pipes for the same they would decline to accept them, notwithstanding the fact that they might be loaded with through freight bound from ocean to ocean, and would compel such equipment to be put on before they would send such cars through.

It is no excuse on the part of the railroad company that the car with which passengers or employees were killed or injured is owned by another carrier, although they have accepted and hauled it. (*Felton* v. *Bullard*, 94 F. R., 781; *B. & P. R. R.* v. *Mackey*, 157 U. S., 72.) At every junction point, from time immemorial, inspectors have been located, and no road accepts cars until such inspectors have passed upon the safety of their equipment and appliances.

As to coupler monopoly.

It is quite true, as stated by the court below, that the Congress "knew the monopoly it would create by requiring every railroad company to use the same coupler, and it did not create this monopoly." There were at least 37 different styles or makes of couplers which were included in the M. C. B. or Janney type adopted by the railroads as a standard, *all having the same contour lines*, so that it will readily be seen that the adoption of the type, or a type, *could not result in a monopoly*. It avoided this by prescribing merely a

condition that must be met, namely, that couplers must be used which will "*couple automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars.*" The Congress left the railroad companies free to adopt such couplers as they saw fit, providing only that when such couplers were brought into contact with other couplers in the ordinary course of business they would "couple automatically by impact," and could be "uncoupled without the necessity of men going between the ends of the cars." The sole purpose of the law was to prevent the thing which Johnson was compelled to do when he received his injury. It was sought to do away with the necessity for men to go between the ends of the cars for the purpose of performing the operations necessary to couple them together or to uncouple them. Mr. H. S. Haines, president of the American Railway Association, expressed this clearly before the House committee which had this law under consideration, as follows:

No coupler monopoly.

Views of Mr. Haines.

> Now, I want to say that the test which you should apply to any proposed legislation is this: What you would be required to do in the interest of these people who are being injured. The test should be, Are you required to lay down a law distinctly as to this or that particular pattern? Are you required to lay down a law as to this or that type? Now, I say no, and I think I can show you why. The man who manipulates that coupler has no interest whatever in the type or locking device or any of the parts connected with it. He can handle it and know nothing

Views of Mr. Haines.

about its internal construction, what its lines are, or anything of that kind. Why? Because all he requests is that he shall not be *required to go in between the cars to do the coupling.* If he can handle those cars in the performance of his duties so that *he is not required to go in between them*, that is all that concerns him. * * * There are two hundred thousand automatic couplers in use on freight cars. But there are a number of devices, and as long as *they will couple together*, I do not think Congress ought to prescribe any particular one. As long as the man can stand at the side of the car I do not think it in the interest of humanity that you are called on to go further than to prescribe that the man *shall be able to manipulate the coupler without going in between the cars.* (Hearings before the House Committee on Interstate and Foreign Commerce in relation to the bill for the protection of trainmen, etc., pages 3, 4, and 7, February 18, 1892.)

On page 8 of this same document, and at this same hearing, Mr. Haines, one of the greatest authorities upon railroading in the United States and their chosen representative at the hearing, said in regard to the actual practice of interchange of cars and of the commonly understood right to refuse cars not equipped as required by law:

> As soon as the railroads which are in line with this improvement—and I have told you that by far the largest mileage in this country is in this association—as soon as they get their own cars,

a sufficient number of them, equipped with this type they will put a regulation into effect that they will not receive cars that have not couplers of a like type. They are going to say, "We are not going to have our men mashed up any more. We can protect our men and we do not require them to go in between cars to couple cars, and if our neighbor comes with an old coupler we won't take the car if our man has to go in between the cars." Some one will say, "How can you do that?" When I hear that said I feel very much like replying as Columbus did in regard to the egg, as to how he would stand it on its end. It is done. Let a man come here with a passenger car with a link and pin coupler and see if it would be hauled. The car inspectors would put a chalk mark on that car and that would be the last of it. * * * Therefore, I say that the lines in line with us on this subject will finally say they can not continue to have their men hurt by the use of the old couplers. * * * I think we can fix it for ourselves just as soon as we get a sufficient number of our cars equipped. Mr. Haines.

At a hearing before the Senate Committee Hon. George G. Crocker, chairman of the railroad commission of the Commonwealth of Massachusetts, said: Mr. Crocker.

> With reference, therefore, to the question of couplers, there is a peculiar element involved in the problem, and that is that it is not sufficient for each road to adopt a form which is in itself good. It is necessary that each road and that all roads should adopt a uniform kind of coupler, or, in other words, couplers which will

be *interchangeable, which will work automatically with each other.* (Hearings before the Senate Committee on Interstate Commerce on S. 811, February 10, 1892, page 26.)

Senate committee.

These requirements were strongly emphasized by all the witnesses that appeared before the committees of Congress, and in its report recommending the passage of this bill the committee of the Senate said:

> The necessity of national legislation looking toward *uniformity* in railway safety appliances is apparent, since it is admittedly a subject with which the various States can not successfully cope. Their incompetency to meet the situation is illustrated by the fact that the legislatures of Massachusetts, Iowa, Mississippi, Nebraska, Minnesota, New York, Ohio, Michigan, Wisconsin, and of other States, realizing their own inability to afford an adequate remedy, have called upon Congress to act. Were the use of freight cars limited to a single State then State laws would be adequate, but the cars within any State at any particular time are largely such as pass from road to road and from State to State indiscriminately, no State line being recognized in railway traffic. The freight car of Massachusetts loaded with the products of that State may in three weeks reach California, passing from ocean to ocean; or the car of an Illinois road may pass through three or four States in a less number of days on its journey from the Lakes to the Gulf. Either of them may have the coupler sanctioned by the State from which it started, but *from its lack*

of interchangeability with the couplers of those cars with which it must be coupled to perform its mission of transporting the commerce of the country it produces death and destruction in every freight yard it enters. (Senate Report No. 1049, Fifty-second Congress, first session, page 5.)

On this subject the House committee reported as follows: House committee.

> WITHOUT UNIFORMITY THE DANGER TO EMPLOYEES IS FULLY AS GREAT AS WITH THE OLD LINK AND PIN COUPLER and hand brake, and representatives of the switchmen and trainmen who appeared before the committee stated that *unless there could be uniformity they would prefer to go back entirely to the old link and pin*—that the danger had increased from the use of so many different types; which statement seems corroborated by the large increase in casualties appearing in the statistics of 1890 over those of 1889. * * * The committee recognize that it is a serious question whether the best type of coupler has yet been devised, but they believe that if the railroads of the country are compelled to act, and reasonable time is given for them to come together, the result will be the adoption of some *uniform interchangeable type of coupler.* (House Report No. 1678, Fifty-second Congress, first session, pages 3, 5.)

As was stated by Mr. W. E. Rodgers, chairman of the National Committee on Safety Appliances, appointed by the National Convention of Railroad

Commissioners, and who testified before the Senate committee on February 10, 1892:

Mr. Rodgers.

> In consequence of the large number of employe es of railroads who are injured or killed in this dangerous occupation, the subject was taken up by the various State legislatures, beginning about ten years ago by the passage of laws in the different States requiring railroad companies within the respective States to equip their cars with an automatic coupler. * * * Acts were passed compelling the adoption of one of several couplers. A time was set within which the corporations were to conform to this act. The result was that one railroad would adopt one coupler, another would adopt another coupler, and the result was confusion confounded. In consequence of the interchange of cars from one State to another, the fact was soon developed that a car coming from Ohio to New York equipped with one coupler would not couple with the coupler that had been adopted by the railroad that it found in the State of New York, and thus the dangers became greater. (Hearings before the Senate Committee on Interstate Commerce on Senate bill 811, February 10, 1892, page 4.)

The following quotations from bills that were presented to the Congress will still further emphasize the fact that the question of uniformity and interchangeability was ever before the Congress. Section 7 of a bill introduced into the Fifty-first Congress, on April 12, 1890, reads as follows:

> That whenever any railroad company, corporation, person, or persons engaged in the transportation of interstate commerce on any railroad shall have equipped their rolling stock, either prior to or by the time of the dates fixed in this law with such automatic safety appliances as contemplated in this act, such corporation, company, person, or persons, may lawfully refuse to receive cars for transportation over their own lines or for switching purposes from lines of connecting roads that are not equipped with such automatic safety appliances as will work, interlock, and interchange automatically with the system of automatic couplers and brakes in use on its own rolling stock.

Bills.

This bill was H. R. 9682 and S. 3665. In this same Congress, on May 27, 1890, H. R. 10555, "For the selection of a uniform type of coupler," was introduced. Section 2 of this bill provided, among other things, that whatever type of coupler should be selected "it shall admit of its coupling with other types of couplers now in use until such time as all cars will be equipped with its own kind."

In the Fifty-second Congress, on December 14, 1891, S. 811 was introduced, section 7 of which was the same as section 7 of S. 3665 quoted above, and on January 5, 1892, H. R. 117 provided (section 6) as follows:

> That the main design of this law being this, namely, greater safety to employees in handling cars and running trains which may be engaged in moving interstate commerce, it requires all

> persons, companies, or corporations owning or using such cars and trains to adopt a uniform system of coupling and uncoupling such cars, and it enforces upon all such parties engaged in interstate commerce the universal use on all their cars of the standard type of safety couplers as established by the majority of such persons, companies, and corporations, through the American Railway Association, and the so-called safety couplers mentioned in this act must be uniform in their action, so as to be interchangeable upon all the cars on any railroad engaged in the interstate commerce, and they must be such as will not require the men to stand between the ends of the cars when the act of coupling is done or require them to go between the cars to uncouple them when in a normal condition.

Federal legislation was necessary, and the Congress had before it the problem of requiring interchangeability of couplers *without creating a monopoly* that would inure to the benefit of the owner of any one coupler at the expense of all the others.

Patents on couplers.

At the hearings before the committees of Congress the fact was brought out that there were over 7,000 patents covering safety car couplers in the United States. The selection of the best out of this mass of inventions was a very serious problem, especially when the selection was to be made without creating a monopoly in favor of any particular person, firm, or corporation. The railroads had already rendered very material assistance to the solution of this problem.

THE RAILROADS HAD ADOPTED A UNIFORM INTERCHANGEABLE TYPE OF COUPLER.

At a meeting of the American Railway Association in 1878 the attention of the association was called to the importance "of having the several patterns of self-couplers to be so designed as to COUPLE INTERCHANGEABLY," and the association laid down the principle "that all safety couplers must be without link and pin and couple INTERCHANGEABLY." (Page 44, American Ry. Management, by Haines.) This association represented a great majority of the railway mileage of the country, and the principle thus laid down by it was the germ of the action which finally led to the adoption by the railroads of a single *type* of coupler, known as the "vertical plane," or "Master Car Builders'," or "Janney" type. M. C. B. type.

In 1887, or previous to the introduction of this question into Congress, the executive committee of the Master Car Builders' Association, as the result of exhaustive tests made under its direction to determine the best form of automatic coupler to meet all the conditions of service, reported "that this association recommends as a standard form of coupling the Janney type of coupler; that the association procure one of the present make of Janney coupler, selection being made by a committee appointed for that purpose, and then all other forms of couplers that will automatically couple to and with this coupler, under all conditions of service, are to be considered as within the Janney type, and conforming to the standard of this association." (Proceedings of M. C. B. Assn., 1887, page

M. C. B. type. 194.) This recommendation was adopted, and at a meeting of the association in 1888 the Janney type of coupler was adopted as a standard of the association. (Proceedings of M. C. B. Assn., 1888, page 169.)

The Master Car Builders' Association represented about 90 per cent of the railroads of the country, and following this action on its part, on June 17, 1888, the Janney Car Coupler Company agreed to waive all claims for patents on contour lines of coupling surfaces of car couplers used on railroads members of the Master Car Builders' Association, and the association said: "The standard of the association is, therefore, with the publication of these lines, definitely fixed, and it is in the power of any inventor or manufacturer of couplers, now or hereafter, to determine for himself whether his coupler will *automatically couple to and with this standard under all conditions of service.*" (Proceedings of 1888, *supra.*)

This is what the railroads themselves had done previous to the introduction of any bill into the National legislature providing for the adoption of such couplers as would not require men to go between the cars to operate. They had selected a *type*, conformity to the contour lines of which would render all makes of couplers *interchangeable*, and these contour lines had been made free, had been dedicated by the inventor to the use of the public, so that all manufacturers or inventors were at perfect liberty to use them.

At the time of the passage of this statute there were thirty-seven patents covering couplers which followed

these contour lines, and by reason of their uniformity with respect to the matter of contour lines these thirty-seven different couplers were INTERCHANGEABLE with each other, although each was different from all the others in some detail of construction. The differences in construction which were covered by patent generally referred to some detail of the locking or uncoupling arrangement, and had no reference to the contour lines or the interchangeability. Representatives of the railroads came before the committees of the Congress with models of these different makes of Master Car Builders' couplers and demonstrated by actual test to the members of the committees that by reason of their uniformity in the matter of contour lines these different makes of couplers would work *interchangeably*.

In addition to this class of couplers known by the generic name of "Vertical Plane," or "Master Car Builders'," or "Janney" couplers, there were a number of automatic couplers which were *interchangeable only with those of their own make or patent, of which the Miller hook was one which was confined to passenger traffic*, the adoption of any one of which would have made such coupler the standard, and would have rendered useless the 200,000 Master Car Builders' or Janney couplers then in service, because whichever one of such couplers might be selected as the standard *would not be interchangeable* with those of the Master Car Builders' type. Such action on the part of the Congress would have confined the railroads engaged in interstate commerce to the use of one particular kind of coupler, and would have created a monopoly in its favor. These various couplers all had their own partic-

Interchangeability.

ular champions, and great pressure was brought to bear upon the Congress to decide in favor of some one particular coupler, or to appoint a commission for the purpose of making tests of all couplers on the market, with power to fix a standard. The effort of the champions of these couplers of other types was to prevent any legislation that would result in fixing the Master Car Builders' type of coupler as the standard of the country. The proposition to fix a standard by means of a commission was resisted by the representatives of the railroads that were members of the Master Car Builders' Association, for the reason that they had already adopted a standard, through the action of their association, which standard was the result of expert knowledge and practical tests extending over a number of years, and it was urged that the decision already arrived at was as valuable, and perhaps more so, than any decision that could be arrived at by a commission created by the Congress.

Legislation.

The matter thus developed into a contest between the Master Car Builder's type of coupler and the other types or makes of couplers, and it was an exceedingly difficult matter for the Congress to decide without seeming to unjustly favor some particular interest. In its report recommending the passage of the law now under consideration the committee of the House acted upon the following suggestion, which had been made by a friend of the law: "I would urge upon the committee not to report any measure which would legislate in favor of any particular type of coupler. Such legislation, it seems to me, would not be fair to all inter-

ested in inventions, to the railroads as a body, or to the man employed. * * * I would make them (the railroads) decide upon a coupler which would meet the requirements as to use in every bill prescribed here."

It will thus be seen that in adopting the language of the statute, the Congress did so with a deliberate purpose and with a full knowledge of the requrements of the situation. The purpose was to *compel the railroads of the country to act*, and by prescribing the condition that couplers must be used which would "couple automatically by impact," and which could be uncoupled "without the necessity of men going between the ends of the cars," the responsibility for the adoption of a uniform interchangeable type of coupler, which would obviate the necessity for men to go between the ends of the cars, was placed upon the railroads, where it properly belonged. Indeed, the railroads invited this responsibility. The trend of all the arguments of the representatives of the railroads before the committees of the Congress was to the effect that, through the action of the Master Car Builders' Association, an organization representing about 90 per cent of the railroads of the country, they had already adopted an interchangeable *type* of coupler, and if permitted to work out the problem in their own way, without being hampered by restrictive legislation, the result would be the final adoption of a coupler that would be interchangeable on all the railroads of the country, whereas if the Congress prescribed a partic-

Conditions called for.

Result.

ular coupler as a matter of law, or left the matter to the decision of a commission created by law (which was the purpose of many of the bills before the Congress), the result would be to relieve the railroads of the responsibility for the selection of a coupler that would best meet the requirements of the situation, would stifle the movement toward progressive improvement of couplers, and very likely result in the adoption of an inferior form of coupler, which would thus become the standard of the country, to the injury of the very men who were intended to be benefited by the law, as well as to the injury of the railroads.

For a number of years previous to the enactment of the statute now under consideration the Congress had had the subject of safety-appliance legislation constantly before it. Demands that something be done to stop the terrible slaughter of men engaged in the operation of railway trains were practically unceasing, and numerous bills were introduced into the Congress looking to that end.

State legislation on the subject of safety couplers had utterly failed, for the very reason that such legislation was unable to secure the thing needed, namely, *uniformity and interchangeability.*

The above statement of legislative history clearly shows the intent of the Congress and the purpose of the statute, and the opinion of the circuit court of appeals that "It does not bar the handling and use of a car which will couple automatically with couplers of its kind because it will not also couple automatically with couplers of all kinds," is entirely unsupported.

The Commonwealth of Massachusetts was one of the first to act in the matter of adopting those measures which led to the safety-appliance acts. In the report of the railroad commissioners for the year 1884 it is stated in part, that— Mass. R. R. Repts.

> It has also been hoped that when such a Commonwealth as Massachusetts should join Connecticut, which has the honor of leading in this humane movement, its example might have weight with other States. * * * One reason for delay that has hitherto been urged with some success, has been the hope that the Master Car Builders' Association would agree upon some one standard freight coupler which would be adopted by all the railroad companies of the country, and so prevent the necessity of legislation.

It may be seen that uniformity was the prevailing object from the following:

> Uniformity was clearly desirable, but it did not involve the purchase of a patent right or the rival claims of inventors. In the selection of an automatic coupler the question is complicated by conflicting interests, and in its adoption the obstacle of cost is a serious one. It is probable that the freight-coupler question will never be satisfactorily settled until the law of liability of employers to employees has been thoroughly revised. The working of a just law covering this whole subject would be likely to supersede the necessity for special legislation as to couplers or drawbars.

Mass. R. R. Rpts.

In the report for 1886 mention is made of the act of 1884, chapter 134, which did not go into effect until March 1, 1885. In this report the Commission said:

> Safety is to be found not only by selecting good devices, but by limiting their number. The ideal of safety will only be reached, if ever, when one universal coupler is adopted. If it were shown that a sixth newly invented coupler were just as good as any one of those already selected, it would not follow as of course that it ought to be approved. To reduce rather than increase the number of couplers in use is the way to gain safety. * * *
>
> The action of the Commonwealth in prescribing the use of safety couplers by law has been subjected to severe criticism. At the meeting of the Master Car Builders' Association in June, a member of the convention (not a master car builder) stated as a fact that "the action of the Massachusetts legislature had cost more lives than the old system, as there was no uniformity in the couplers put on.

In the report of 1888 it is stated (page 54):

> No single State can enforce uniformity in the matter of freight-train brakes and automatic couplers, and it is also obvious that there would be a great difficulty and probably much delay in securing Congressional action. There is, however, reason to hope that the leading lines of railroad will now take up these two questions without waiting for State or Congressional compulsion, and that uniformity throughout the country may practically be attained. * * *

> It may be that progress toward uniformity may be hastened or encouraged by the holding of a convention of railroad commissioners or of railroad officials. It may be that legislation will be desirable. Failure means that hundreds of men will be injured or killed every year. Success means that they shall be saved. Mass. R. R. Repts.

In the Railroad Commissioners' Report of 1891, on page 31, it is said:

> While this discussion as to the merits of the various couplers is going on, brakemen are being unnecessarily mutilated and killed. These accidents will practically cease when every freight car is equipped with a coupler which will couple automatically with the coupler on any other freight car, and which a brakeman can uncouple without being obliged to go between the cars.

From the authorities cited and the history of this statute it must be apparent to all thinking men that it never was intended by the Congress that the law should be as stated by Sanborn, J., that it was no violation of the statute to undertake to couple together two cars each equipped with automatic couplers but which would not couple together, and there certainly exists no necessity for any such construction of the statute against such apparent intention. The conclusion is irresistible that whatever cars the railroad undertakes to couple together, when either of them is being used in interstate traffic, they must both be so

equipped that they will couple automatically by impact without the necessity of men going between the cars.

As shown by the petition of the Southern Pacific Company for an extension of time, dated October 4, 1897, the number of engines belonging to the company on September 1, 1897, was 1,005, of which none were equipped with automatic couplers, while on November 16, 1899, upon the company's second petition for an extension of time, it was shown that on October 1, 1899, they had 1,032 engines, of which 544 were equipped with automatic couplers; and they asked for an extension to equip 488 engines, and, as was shown by the fact that the engines were equipped with the Janney or Master Car Builder's coupler, they had complied with the law in that respect and recognized the necessity for uniformity in coupling equipment. (Vol. VIII, I. C. C. Repts., 643, 666.)

Dining car.

THE DINING CAR "DEL MONTE" WAS USED IN MOVING INTERSTATE COMMERCE.

The evidence shows that the dining car "Del Monte" was used regularly to move interstate commerce between San Francisco, Cal., and Ogden, Utah, and there was no evidence to show it was ever used for anything else. Mr. Rowland, the train dispatcher of the company, testified that it had been used between these points for over four or five years (record, p. 20). Therefore, it was not only regularly used in connection with other cars which were loaded with interstate commerce, i. e., passengers traveling from one State to another, but it

was regularly engaged in *actually* moving interstate commerce in so far as it carried passengers destined from one State to another while they ate. This car was a part of the defendant's equipment built for the purpose of what? Not of alone furnishing such passengers a place to eat, but to also furnish them with a means of transportation whereby they could proceed on their journey while they ate, thus combining the means of transportation and that of furnishing food to passengers, and thereby securing greater dispatch of such interstate travel between Ogden, Utah, and San Francisco, Cal., than could be obtained by a system through which the means of transportation and that of furnishing meals were separate and distinct, i. e., the stopping and detaining of trains at intervals along the road while passengers eat at eating stations.

Interstate character of dining car.

The circuit court of appeals says that at the time of the accident the dining car was not used in moving interstate commerce. It is sufficient to show that the car was used in moving interstate commerce in a general way, and this is shown by the evidence. Section 2 of the act of Congress of March 2, 1893, reads: "It shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car *used in moving interstate traffic.*" Was it not the custom of the defendant to *use* this dining car in transporting passengers between the State of Utah and the State of California?

In *Voelker* v. *Chicago, Milwaukee and St. Paul Railway Co.*, in the circuit court for the northern district of

Iowa, eastern division, in interpreting this provision of the statute the court said (116 F. R., 867 at 873):

> The beneficent purpose of these statutes is defeated if the employees are required to handle cars not equipped as required by the statutes, without regard to the question whether the cars are loaded or not. * * * When companies, like the defendant in this case, are engaged in interstate traffic, it is their duty, under the act of Congress, not to use in connection with such traffic cars that are not equipped as required by that act. This duty of proper equipment is obligatory upon the company before it uses the car in connection with interstate traffic, and it is not a duty which only arises when the car happens to be loaded with interstate freight. It frequently happens that railway companies load cars with live stock or farm produce in Western States and carry the same to the eastern markets, and then return these cars without a load; but it can not be true that on the eastern trip the provisions of the act of Congress would be binding upon the company because the cars were loaded, but would not be binding upon the return trip because the cars are empty. Whenever cars are designed for interstate traffic the company owning or using them is bound to equip them as required by the act of Congress; and when it is shown, as it was in this case, that a railway company is using a car for transportation purposes between two States, sufficient is shown to justify the court in ruling that the act of Congress is applicable to the situation.

Interstate character of traffic.

In *Crawford* v. *New York Central and Hudson River Railroad Company* (10 American Negligence Reports, 166), the court in charging the jury gave expression to the following: Interstate character of dining car.

> The other claim of the defense is that as to these particular cars they were not in use for interstate commerce, because they were not on the road in matter of transit at the time, but were in the yard itself. As to that I charge you if the cars were cars engaged and being used in interstate commerce, it matters not whether they were being made up in the yard or were moving at the time out on the road, because the statute is intended to protect brakemen against the danger of such work, so far as it can protect them against such dangers, and it matters not whether interstate commerce cars were being made up to start out on the road or whether they were actually moving along between the States at the time, so far as the purpose and intent of the statute is concerned. In fact, *in the making up*, there is more necessity for the brakemen to be at their work, coupling the cars, bringing them together, than in the operation of the cars after they once start out from New York for Boston, New Haven, Chicago, or elsewhere.

But the circuit court of appeals says: "The dining car in this case was standing empty on the sidetrack. * * * If the defendant had drawn it vacant over every foot of its railroad, * * * it would not have fallen under the ban of the statute." Such a construction of the law when followed to a conclusion destroys

C. C. A. on travelers.

a very great portion of the safety intended by Congress to be thrown around railway employment and railway travel in general when it enacted this law. The learned court failed to recognize the important fact that the purpose of the act was to give protection not only to those employees who might be actually employed upon the particular cars or trains upon which these safety appliances are in use, but also to protect other employees and *travelers* who were employed or *traveling* upon other cars or trains of the same common carrier which came in contact with them. For example, let us say the defendant did put this dining car in a train and run it over its road empty, and owing to the fact that it was not equipped with the safety appliances required by the act of Congress it would collide with another train which contained interstate traffic—passengers traveling from one State to another—and some of these passengers, or employees upon said train, should be killed or injured. Would this not be a violation of the law? That the statute was intended by Congress to cover such conditions is evidenced by the following quotation, which is taken from House committee's report on H. R. 9350, which was the bill that became law: "When the rails are in constant use by passenger and freight trains indiscriminately, running within a few minutes of each other, the driving brake and the train brake are essential means of safety to the traveler and the employee alike." (House Report 1678, Fifty-second Congress, first session, p. 5.)

But the circuit court of appeals says: "But this statute must be read not only in the light of the rules

Effect of opinion of court below.

of construction, * * * but also in view of the power of Congress in this respect. It is by virtue of the power granted to Congress to 'regulate commerce among the States,' and by virtue of that authority alone, that this statute was enacted and has efficacy." If Congress has the authority to protect travelers upon railroads and the employees upon the trains on which they are hauled by requiring safety appliances upon such trains, why has it not also the authority to protect them further by requiring that all other trains and cars with which they are brought in contact shall also be so equipped? *Why can Congress protect the man on the train which crashes into another train and not protect the one on the train which is run into?* That the power of Congress is a broad one see *Hanley* v. *K. C. S. R. R.* (187 U. S., 617).

The one great reason for Congressional action regarding safety appliances was to establish uniformity throughout the entire country, something that could not be accomplished by State legislation for the reason that one State could require one type of a coupler while another State would require a different type, and when these couplers were brought together they would not interchange, thus causing not only danger to employees, but delay to interstate traffic as well. In *Mobile* v. *Kimball* (102 U. S., 691), this court held that when the establishment of a uniform system of the entire country is necessary, the grant of power to Congress is exclusive, and any police regulation of the State interfering must give way.

Canal-boat case.

In a recent case this Court assumed jurisdiction over the repairs made in dry dock in Niagara County, N. Y., on a canal boat in order to maintain and give effect to that clause of the Constitution conferring admiralty and maritime jurisdiction on the United States courts. (*The R. W. Parsons*, 191 U. S., p. 17.)

Yet the circuit court of appeals lays down as a matter of law that—

> It is not, then, unlawful, under this statute, for a carrier to haul a car not so equipped which is either used in intrastate traffic solely, or which is not used in any traffic at all. It would be no violation of the statute for a carrier to haul an empty car not used to move any interstate traffic from one end of its railroad to the other. It would be no violation of the law for it to haul such a car in its yards, on its side track, to put it into its trains, to move it in any manner it chose. *It is only when a car is "used in moving interstate traffic" that it becomes unlawful to haul it unless it is equipped as the statute prescribes. On the day of this accident the dining car in this case was standing empty on the side track.*
>
> * * * * *

Empty car.

The car was vacant when it went to the turntable, and vacant when it returned. It moved no traffic on its way. How could it be said to have been "used in moving interstate traffic" either while it was standing on the side track or while it was going to and returning from the turntable? If the defendant had drawn it vacant over every foot of its railroad, it would not

have been engaged in moving interstate traffic, and it would not have fallen under the ban of the statute. How can it thus fall because it was moved in the same way over a small portion of the road? The argument of counsel for the plaintiff is that because it had been used in moving interstate traffic on its way from San Francisco to Promontory, and because it was the intention of the defendant to put it to the same use in a few hours, when a west-bound train arrived, it was impressed with the use of moving such traffic in the interim. * * *

Empty car.

Is the turning of a vacant car which its owner intends to use at some future time in moving interstate traffic any part of commerce among the States? Does the intention of the owner as to a future use of an implement of transportation affect the character of the act of turning this car? If the defendant had intended to use this dining car for traffic within the State of Utah only, if it had intended to send it to the shop to be destroyed or repaired, or if, after the car was turned, it had changed its intention and concluded that it would not use it to move interstate traffic, would any of these intentions or this change of purpose have affected the act of turning the car, and have impressed it with a use in interstate commerce or intrastate commerce? The only answer to these questions is a negative one, and, if this be true, then the intention of the defendant to use this car at some future time in interstate commerce would not make the act of turning it a part of such commerce, nor bring it under the

ban of the act of March 2, 1893. The opinion and decision of the Supreme Court in *Coe* v. *Town of Errol* (116 U. S., 517, 525, 526; 6 Sup. Ct., 475; 29 L. Ed., 715) lend strong support to this view.

Voelker case.

In the Voelker case, cited herein, recently decided by the circuit court of appeals, Judge Van Devanter writing the opinion, the following was stated:

> We think there was evidence that the carriage or movement of the coal with which the car in question was loaded had not terminated, and that the coal was still actually in transit. *The evidence contains no suggestion that the car had reached the end of its journey, or that it was to remain indefinitely or for any considerable time on the track where it was at the time of the injury, or that the coal was to be unloaded there* (our italics). The inference to be reasonably drawn from the evidence is that the car was then about to actively continue the journey toward the ultimate destination of the coal which it was carrying. Whether that was near by or remote is not material, because the shipment had originated in another State and was already impressed with the character of interstate traffic which would follow it at least until the actual transit ceased.

The second paragraph of the complaint in the case at bar, on page 2 of the transcript of record herein, states "that said engine at the said time (was) being used in moving interstate traffic, * * * and to couple said engine on to a certain dining car, also used in moving interstate traffic, which was standing at the

time above mentioned in the yards of the said company (Southern Pacific) in the said town of Promontory." Voelker case.

Inasmuch as Judge Sanborn and Judge Thayer did not dissent from the opinion in the Voelker case, in which they as well as Judge Van Devanter sat, and participated in the rendition of judgment, it is a fair inference that they concurred in what is virtually a reversal of that part of the Johnson case which holds as a matter of law that the dining car "Del Monte" was not engaged in interstate commerce, and upholds our contention that at all events this was not a question of law for the court:

> * * * It moved no traffic on its way. How could it be said to have been "used in moving interstate traffic" either while it was standing on the sidetrack or while it was going to and returning from the turntable?

It is no part of this brief to go into what may be called a question for the jury, but the judgment of the court below should be reversed because it did not submit this and other questions of fact to the jury. In other words, What was the dining car being used for? In the *Parsons case* (*supra*) the court said, "The crucial question is, Whether they are ships or vessels within the meaning of the admiralty law?"

> In fact, neither size, form, equipment, nor means of propulsion are determinative factors upon the question of jurisdiction, which regards only the purpose for which the craft was constructed and the business in which it is engaged.

In the Parsons (Canal Boat) case the owner set forth a claim under section 563 of the Revised Statutes, but no more directly nor distinctly than does the complaint in the Johnson case set forth the reliance upon the Federal safety-appliance act. Would not a parity of reason incline this court to declare either that the dining car Del Monte had such a character as an interstate car as to fall within the protection of the safety-appliance act, as a question of law, or else that the withdrawal of this question from the jury was so vital and so determinative of the entire character of the action with its decision adversely to Johnson that it resulted in a fatal error requiring a reversal of the judgment?

Interstate character of dining car.

The evidence in regard to the dining car shows that it had been used regularly for some five years in a regular run from San Francisco to Ogden—from California to Utah. Compare this with the canal boat, used in navigation on the Erie Canal, down the Hudson to Jersey City. Is the character of the equipment to govern, or is the past use to govern?

The car was generally used in interstate traffic, and until the defendant disproves this continuing use, the presumption is that it would continue to do so. Plaintiff's uncontradicted testimony at least established this point.

In other words, the determinative factor upon the question of jurisdiction, to quote the language of the court in the canal-boat case, is one which regards only the purpose for which the craft was constructed and the business in which it is engaged.

As was said in The Old Natchez, 9 Fed., 476:

> The liability depends upon the use then being made or intended to be made of the vessel or other article and not upon the mere fact that it is at the time afloat.

Interstate character of dining car.

Dining cars are generally used to feed passengers on through-going trains. Through-going trains usually carry passengers who come from without the State into and through the State. Can it be doubted that the dining car Del Monte was, in the case at bar, turned for any other purpose than for the express object of being more accessible to the persons whom they expected to use it on the west-bound train and was therefore in the act of serving the purpose of an interstate commerce character?

The circuit court of appeals states: "Is the turning of a vacant car which its owner intends to use at some future time in moving interstate traffic any part of commerce among the States?" "Does the intention of the owner as to a future use of an implement of transportation affect the character of the act of turning this car?" The answer to this question may, we submit, be found in the opinion of this court in the Canal Boat case. In that case although the canal boat was high and dry within the body of a county of New York State, yet although the court admitted that an admiralty court had no jurisdiction over a dry dock it still retained jurisdiction over the vessel. It might well have been said in that case as in this: "If after the car was turned (after the boat was repaired) it had

terstate racter of g car.

changed its intention and concluded that it would not use it to move interstate traffic (not use the boat for navigation), would such change of purpose have affected its interstate character?"

Again the circuit court of appeals states:

> It is only when a car is "used in moving interstate traffic" that it becomes unlawful to haul it unless it is equipped as the statute prescribes. On the day of this accident the dining car in this case was standing empty on the sidetrack; the defendant drew it to a turntable, turned it, and placed it back upon the sidetrack. The accident occurred during the performance of this act. The car was vacant when it went to the turntable and vacant when it returned. It moved no traffic on its way. How could it be said to have been "used in moving interstate traffic" either while it was standing on the sidetrack or while it was going to and returning from the turntable? If the defendant had drawn it vacant over every foot of its railroad, it would not have been engaged in moving interstate traffic, and it would not have fallen under the ban of the statute. How can it thus fall because it was moved in the same way over a small portion of the road?

The key of this part of the opinion lies in the words, "*It moved no traffic on its way.*" There is no evidence to show that the dining car was completely empty. The object of a dining car is not to handle freight or transport groceries in bulk, etc., from one State to another, but to feed people; to make through travel

on passenger trains a possibility, and to relieve the carrier of the necessity of halting at eating houses or restaurants and indulging in other methods of frittering away the time.

The circuit court of appeals misapprehends the law when it appears to put the dining car which had been left at Promontory under the circumstances stated at various points in this brief in the same class with logs which had been floated down the river in the case of *Coe* v. *Errol* (116 U. S., 517) Coe v. Errol.

The opinion and decision of the Supreme Court in that case does not bear out the analogy which the circuit court of appeals relies on.

Although the Supreme Court held that the logs which had been left at Errol were not subjects of interstate commerce until "They were committed to the carrier for transportation out of the State to the State of destination, or have started on their ultimate passage to that State," and the fact that the owners intended to export them could not change the situation because the owners might change their intention.

The logs in the Errol case were as much a part of the wealth of the township of Errol and subject to police protection and to whatever benefits there might be obtainable in the village as other property. Let it be noted that the Supreme Court gives two alternatives as the criterion, either that they were committed to the common carrier for transportation or that they had started on their ultimate passage to that State—neither of these tests are relevant in this inquiry.

If there is any difference between a dining car, about to be used to feed passengers on a return interstate trip, and hence to be turned, and logs left high and dry from one season to another to be floated down when the new freshets supply the water, it is not difficult to see that error was committed by the supreme court of appeals of Virginia in *Norfolk and W. R. Co.* v. *Com.* (24 S. E., 838; 34 L. R. A., 105; 57 Am. St. Rep., 827).

The decision of Coe against Errol is founded upon taxation only and consequently has nothing to do with the general regulation of commerce. The great case in which the law was laid down as to the distinction between internal commerce which is subject to the control of the States, called *intrastate* commerce, and commerce among the States may be found in the case of *Daniel Ball* against *United States* (10 Wallace, 557). See also *Pensacola Tel. Co.* v. *W. U. Tel. Co.* (96 U. S., 9); *Gibbons* v. *Ogden* (9 Wheat., 1).

It would be futile to undertake in this brief to review all of the cases decided by this court in which the question has been considered as to when articles become impressed with the character of interstate traffic and when they cease to be so impressed, with all of the incidents thereto, for the reason that in the recent case of *Kelly* v. *Rhoads* (188 U. S., 1) Mr. Justice Brown sums up the criteria which are used to settle such questions when he says:

> Bearing in mind that the weight of all the previous cases in this court has been laid upon the fact of an indefinite delay, awaiting trans-

portation at the commencement of the journey, or awaiting sale or delivery at its termination, the facts in this case fail completely to bring it within those authorities.

Was car empty?

This car was not awaiting transportation at the commencement of its journey. How could it be called the commencement of the journey at all, when it is considered that Promontory is nothing but a station from which no train could possibly start, where the dining car could, under no circumstances, be equipped, and it was only put there as part of its journey from San Francisco to Ogden and return? It is just as clear that it was not the termination of its journey, nor was it an indefinite suspension of the journey; on the contrary, the suspension was definite to the most accurate degree possible, and was temporary in character, and it is well said that no temporary stoppage of interstate traffic will deprive the goods or vehicle of its interstate character.

Delaware & Hudson Canal Co. v. *Pennsylvania*, 1 L. R. A., 232.

When it is remembered that by R. S. sec. 3964, 17 Stat., 308, section 201, all railroads in the United States are by law post roads and that the power of Congress over commerce and post roads is absolute and complete and its source of power is clear, it follows that the prohibition by Congress for "any carrier engaged in interstate commerce by railroad, to haul or to permit to be hauled or used on its line (that includes every form of siding), any car used in moving interstate traffic not equipped with couplers coupling automatically

by impact" is clear. Had Congress intended that dining cars were to be exempt from the statute it would have said "any car" except dining cars or cars used for dining, or some apt words to express the meaning of the legislature. The fact of the matter is, the statute uses the words "any car," which includes a dining car, because it is one of the species or particular, whose genus is "any car."

Was dining car empty?

As far as inferences go, what authority did the court below have for determining as a question of law that the dining car Del Monte was empty? It had come to Utah from California and was going back from Utah to California. The direct contrary inference is not only permissible, but unavoidable, when the uncontradicted sworn testimony is recalled, which gives the reason for turning the dining car.

There is not a scintilla of evidence to show that the dining car Del Monte can be classed with—"Empty cars in repair shops in yards, on side-tracks," which the circuit court of appeals tries to use as an analogy for holding that this dining car Del Monte was empty in that sense. The question whether it was empty or not is, as soon as stated, seen to be a question of fact. The court has made it a question of law. It is certainly material to the question of the recovery of the judgment in this case, and should, therefore, not have been decided by the court as a question of law.

The reasoning of the court in treating the Del Monte as an empty car virtually makes switching a process to which the safety-appliance act does not apply.

The circuit court of appeals states its opinion on this point in the following words:

> But vacant cars which are not and may never be so used can not be held to come within the fair import of the terms of this law either because their owner intends to use them for that purpose at some future time or because they have been or will be so used. Empty cars in repair shops, in yards, on side tracks, those in use to transport traffic within a State, and for that purpose alone, are not in use to move articles of interstate commerce, and do not fall under the ban of this law. Neither the empty dining car standing upon the side track nor the freight engine which was used to turn it at the little station in Utah was then used in moving interstate traffic, within the meaning of this statute, and this case did not fall within the provisions of this law.

This embodies a most dangerous doctrine. *It virtually says that switching or turning a car, unless it is full of passengers or freight, is a process not protected by the safety-appliance act.* The vice of this doctrine seems to proceed as follows: Switching is an operation entirely conducted within one State, unless the yard is situated upon the boundary of two States. There can, consequently, be nothing of an interstate character in moving interstate traffic in a yard, and therefore no car that is being switched within a yard heretofore described need have couplers—"that fall under the ban of this law," as Sanborn, J., refers to this remedial and salutary statute.

Switching.

Switching. Yet it must be recalled that the safety-appliance act was passed "to compel common carriers engaged in interstate commerce to equip their cars with" couplers that couple automatically by impact; it did not state that switching was to be an operation exempted from the purview of the statute, and therefore under well-known rules of construction the operation of switching must have been in contemplation of law covered by the words of the act. It was to make the operation of switching safe, because that was the place in which men's arms and limbs and lives had been sacrificed. On the rails the only chance in which defective couplers might injure the operation of railroading had been the parting of a link and on heavy grades the coming together of two parts of a train at unequal speeds. In other words, if they ran away. But the appalling totals of killed and maimed had been occasioned in the main in this very operation of switching, when men were required to go between the cars and use a link and pin.

Practically the only time when these couplers must be in good repair is when switching operations are about to be carried out. Did those who drafted the statute suppose that when the command was laid upon all carriers engaged in interstate commerce by railroad not to haul or permit to be hauled or used on its line any car *used in interstate traffic*, that they would have a separate equipment of couplers, coupling automatically by impact when they carried interstate traffic, and a different set of couplers when they were

engaged in commerce that originated within a State and did not leave that State, or when the cars were being switched or handled preparatory thereto by a carrier engaged in interstate commerce by railroad? The mere statement of the proposition demonstrates its absurdity.

THESE WERE QUESTIONS OF FACT FOR THE JURY.

Questions of fact.

The use of the Miller hook with the Janney coupler, because it greatly increased the danger, was negligence. (*Russell* v. *Ry. Co.*, 32 Minn., 230, 233, 20 N. W., 147; *Hungerford* v. *Ry. Co.*, 41 Minn., 444, 43 N. W., 324; *Ry. Co.* v. *Garrett*, 73 Tex., 262, 13 S. W., 62, 15 Am. St. Rep., 781; *Martin* v. *Ry. Co.*, 94 Cal., 326, 329, 29 Pac., 645; *Southern Pac. Co.* v. *Burke*, 9 C. C. A., 229, 60 Fed., 704; *Smith* v. *Ry. Co.*, 72 Hun., 545, 25 N. Y. Supp., 638. See also *Northern Pacific Ry. Co.* v. *Tynan*, Fed. Rep., vol. 119, p. 288. Also *Greenlee* v. *Southern Ry. Co.*, 122 N. C., 977–982, 30 S. E., 115; 41 L. R. A., 399; *Troxler* v. *Southern Ry. Co.*, 124 N. C, 191; 32 S. E., 550; 44 L. R. A., 313.)

The title of the act plainly states that its purpose is "to *promote* the safety of employees and travelers upon railroads." At the time of its passage the coupler most universally in use was the link and pin, and it was to improve upon the conditions then existing as a result of the use of such coupler, that is "to *promote* the safety of employees," that Congress passed this act. Now, since it is an undisputed fact that it is more difficult and more dangerous to couple an M. C. B. coupler to

Questions of fact.

a Miller hook, which was the kind of a coupling attempted to be made by Johnson, than it is to couple together two of the old link-and-pin type, can it be contended that a condition which requires the making of such a coupling is "*promoting* the safety of employees upon railroads?" Indeed, it can be truthfully said that such a condition *increases the danger* rather than *promotes* the safety of employees?

It being clear that the use of the Miller hook with the Janney coupler was in and of itself an act of negligence, we contend that the trial court had several questions of fact before it on the evidence which should have been submitted to the jury for its determination.

If the application or nonapplication of the act of Congress depended upon the condition of the dining car, then it seems to us it would be a question of fact whether such dining car was empty at the time of the accident, and, whether empty or not, whether it was used in interstate commerce or not, subject, of course, to proper instructions as to the law by the court.

So, too, the question as to whether the engine or its tender was a car in the meaning of the act, subject, of course, to proper instructions as to the law.

Also whether the engine was used in interstate traffic.

The constitutional right of the citizen to have the facts of his case tried by a jury must not be encroached on by the courts under any pretext. As was said by Lord Hardwicke, "It is of the greatest consequence to the law of England and to the subject that these powers of the judge and jury be kept distinct; and that the

judge determine the law and the jury the fact, and if ever they come to be confounded it will prove the confusion and disruption of the law of England." (*Rex* v. *Poole*, *Cas. temp.*, Hardwicke, 28.) And to show what the law of the case is, we have ventured to reprint at length some excerpts from opinions hereon. Duty of master.

In *Mather* v. *Rillston* (156 U. S., 391) the court says:

> Occupations, however important, which can not be conducted without necessary danger to life, body, or limb, should not be prosecuted at all without all reasonable precautions against such dangers afforded by science. The *necessary danger attending them should operate as a prohibition to their pursuit without such safeguards.* Indeed, we think it may be laid down as a legal principle that in all occupations which are attended with great and unusual danger there must be used *all appliances readily attainable*, known to science, for the prevention of accidents, *and that the neglect to provide such readily attainable appliances will be regarded as proof of culpable negligence.*

In *Texas and P. Ry. Co.* v. *Carlin* (111 F. R., p. 778–779) the following was said on the question of negligence:

> But it is not the province of the court to weigh the evidence, and decide between conflicting statements of witnesses, or to decide what inference should be drawn from uncontradicted evidence, if different minds could fairly come to different conclusions from it. A question of negligence, dependent on evidence, should not be taken from the jury, except in

Standard of are.

cases where there is no material conflict and where there is no room for different minds to draw different inferences from it. The question of negligence is one of law for the court, only when the facts are such that all reasonable men must draw the same conclusions from them. A case should not be withdrawn from the jury unless the conclusion follows as matter of law that no recovery can be had upon any view that can be properly taken of the facts the evidence tends to establish.

Dissenting opinion in *Kilpatrick* v. *Choctaw, O. & G. R. Co.* (121 F. R., p. 16) (Caldwell, J.):

> It is not at all likely that the judges of that court would attempt to determine the question either as engineering experts or from practical experience as brakemen and switchmen. Judges not being qualified to speak either as engineering experts or from actual observation and practical experience, it is difficult to understand upon what principle they can declare that railroad companies are not required, for the protection of their employees, to block their guard rails and frogs, or resort to some equivalent or better device to protect their employees from the known and obvious dangers of open guard rails and frogs.
>
> * * * * *
>
> Our reason revolts and our humanity is shocked at the judicial declaration that railroad companies are not required to do anything in that direction, not even so much as to use, in the language of Judge Taft, "a well-known safety device."

Questions of fact.

It should be left to the jury, upon a consideration of all the evidence, to say whether the railroad company is guilty of culpable negligence in neglecting to provide, in the language of the Supreme Court, "such readily attainable appliances" as would lessen or prevent the danger. Juries, upon a consideration of the evidence, are much more capable of deciding this question than judges, and besides, it is a question of fact which belongs to the domain of juries to decide. If in the beginning, instead of leaving these questions to the jury, where they rightfully belong, judges had taken it upon themselves to decide that railroad companies were not required to do this or that thing for the safety of their employees or passengers, or were not required to operate their trains in this manner or that manner for a like purpose, there would to-day be small safety either for employees or passengers. *It is mainly to the verdicts of juries we owe most of the improvements in appliances and methods of operating railroads which have lessened the dangers to their employees and passengers.*

Whenever it is made to appear to a railroad company that it costs more to pay the damages assessed against it by the verdicts of juries for maintaining a dangerous condition of its track or appliances than it would cost to substitute safe ones in their place, the substitution is quickly made. But as long as courts hold as matter of law that what the witnesses in this case declare to be "simply a death trap" may be maintained with impunity and without incurring any pecuniary liability, the death trap will remain and

the slaughter go on. *The decision of the majority of the court makes human life in this circuit a cheaper commodity than lumber.*

Questions of fact.

Ordinarily there is a question, What are reasonably safe appliances? These certainly are questions of fact, which in this case were never passed on by the jury. In this case, however, the statute, after a delay of more than seven years, definitely prescribed, not the make or type or kind of appliances, but ordered that "It shall be unlawful for any such common carrier to haul or permit to be hauled or used on its lines any car not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

The question whether the Southern Pacific Company fulfilled this duty—this positive duty—is certainly a question of fact. Was the dining car Del Monte equipped as the safety-appliance act required it to be equipped on August 1, 1900?

We respectfully urge on the attention of this court the requirements of the safety-appliance act. The Miller hook was an appliance that was antiquated and would never couple automatically by impact with a Janney or M. C. B. type of coupler, which was an appliance readily attainable at a cost of about $18.

The jury should have passed on the question of the reasonableness of using a Miller hook on a dining car used in interstate commerce in August, 1900, when it was bound to come in contact with an M. C. B. coupler—

the usual form of coupler. Was it a reasonably safe appliance? Did it comply with the safety appliance act?

Has the Southern Pacific Company, the master, fulfilled its duty—a duty it could not delegate, one imposed by statute and by common law—of furnishing its servants with appliances that are readily attainable and safe, in respect to any one of the questions of equipment of the dining car raised by the above? Duty of master.

These questions were not permitted to be passed on by the jury, and it is submitted that each omission was an error.

There is no law requiring the master to take off a Miller hook and put on a M. C. B. type of coupler, *but it is the law that a car furnished by the master shall be reasonably safe to handle.* And under the safety-appliance act it is and was the law that couplers must couple automatically by impact. Whether that requirement of the statute could only be observed by using a coupler of the M. C. B. type is certainly a direct question of fact material to the determination of the issues in the case, and should have been submitted to the jury. The mere fact of its being a debatable question of fact, about which reasonable men can in good faith differ, as is shown by the fact that the brief submitted by the Southern Pacific Company questions this very statement, shows that a question of fact was involved applicable and relating to the most material

Duty of master.

points of the evidence, namely, the negligence of the defendant company, which under the law should have been submitted to the jury.

It is a question of fact whether the car was or was not reasonably safe to handle in view of the development of the art on August 1, 1900. As was said in *Grattis* v. *Kansas City P. & G. R. Co.* (48 L. R. A., 408): "The master is not bound to furnish the safest and best appliances that could be used. He is acquit of fault if what he furnishes is reasonably safe and suitable." What are or what are not reasonably safe appliances are plain questions of fact which should have been submitted to the jury, and the circuit court of appeals erred in not directing that this should have been done, and it certainly erred fatally in affirming a judgment that had withdrawn the case from the jury on the question of defendant's negligence.

The decision of the circuit court of appeals, in effect although not in words, makes the law of the case that Johnson assumed the risk incident to the defective coupler; but section 8 of the safety-appliance act distinctly states:

> That any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provisions of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge.

During the debates in Congress, particularly in the Senate, on the Safety-appliance Act the distinction between contributory negligence and assumption of risk was clearly defined. (Vol. 24, Congressional Record, 52d Congress, 2d session).

Ordinarily the courts do not permit research to be made into the motives of the legislators or debates preceding enactments of statutes by Congress, but the opinion in the case of the *Holy Trinity Church* against *The United States* (143 U. S., 457) shows that this is permissible where there is an obscurity or misunderstanding.

In *Greenlee* v. *Southern Railway Company* (122 N. C., 977), Judge Clark says:

> Contributory negligence of a brakeman in coupling cars will not preclude a recovery for injury caused by the absence of self-couplers, which constituted continuing negligence of the master and existed subsequently to his negligence.

Questions of fact.

The questions of fact that we contend should have been submitted to the jury can be multiplied ad infinitum. The reasoning of the learned circuit court of appeals shows what questions of fact should have been submitted to the jury. Its reasoning shows how necessary they were to its decision, and how impossible it was for it to have reached its conclusions without a thorough examination of its various chains of facts and circumstances. Now the very fact that there was a dissenting opinion in the circuit court of

Questions of fact.

appeals by Judge Thayer on the question of fact of the interstate character of the dining car, shows that there was more than one question of fact undetermined. Judge Thayer's objection is stated in these words:

> I am also of opinion that, within the fair intent and import of the act, the dining car in question at the time of the accident was being hauled or used in interstate traffic. The reasoning by which a contrary conclusion is reached seems to me to be altogether too refined and unsatisfactory to be of any practical value. It was a car which at the time was employed in no other service than to furnish meals to passengers between Ogden and San Francisco. It had not been taken out of that service, even for repairs or for any other use, when the accident occurred, but was engaged therein to the same extent that it would have been if it had been hauled through to Ogden, and if the accident had there occurred while it was being turned to make the return trip to San Francisco. The cars composing a train which is regularly employed in interstate traffic ought to be regarded as used in that traffic while the train is being made up with a view to an immediate departure on an interstate journey as well as after the journey has actually begun. I accordingly dissent from the conclusion of the majority of the court on this point.

The fact that of three judges of a circuit court of appeals one differs from the majority on what they contend is a material portion of its contention certainly presents a case where all reasonable men do not draw

the same conclusions from the same facts, and therefore a question of law for the court is not presented. (*R. R.* v. *Ives*, 144 U. S., 409.) Question of fact.

Had the court below not committed error, the questions for the jury, it is submitted, would fall in the following categories: First. Those relating to the equipment of the dining car Del Monte. Was it equipped with a safe and proper appliance to be used by the Southern Pacific Company? Should a car so equipped have been used after the safety-appliance act went into effect? Was it not a violation of the safety-appliance act to "*use a car*" that would not "*couple automatically by impact*" with anything with which they undertook to couple it, and was Johnson's injury the result of a violation of the company's duty as prescribed by Congress—in other words, the consequence of the company's violation of its statutory duty? That is all there is to this case.

The circuit court of appeals erred when it did not reverse the judgment below, and when it held that the operation of switching a car not arrived at its destination was not an operation of interstate commerce.

What warrant had the circuit court of appeals in holding as a matter of law that the Del Monte was an empty car, and not engaged in interstate commerce? The testimony of Rowland, the train dispatcher at Ogden (print, p. 21), shows that the Del Monte was ordered to be turned at Promontory, "So as to have the kitchen in the rear instead of in the front" when this diner went back to San Francisco.

The train dispatcher testified (print, p. 24–21) "the dining-car conductor requested it to be turned around; his idea in having it turned was so as to leave the main entrance next to the train."

There is nothing to show that besides the dining-car conductor this dining car did not have its complement of steward, cooks, and waiters, all preparing the meal for the next trainload of westbound interstate passengers for California.

Character of dining car.

And there is the more reason for this since that is the precise reason why the dining car Del Monte was dropped and was left at Promontory. In the opinion of the circuit court of appeals the interstate character of the dining car is an important issue. Constantly the court says the dining car was empty and not engaged in interstate commerce, and yet the second part of the syllogism is based on the deductions drawn from the assumption that that car was empty. That conclusion is drawn from a fact, and is based on what is believed to be a fact, and there is no reason why that fact should be determined by the court when it is so debatable. It should, on the contrary, have been submitted to the jury—the constitutional triers of questions of fact. The evidence contains no suggestion that the Del Monte was to be left permanently at Promontory, or that Promontory was its destination. On the contrary, every reasonable circumstance points to the one conclusion that, had it not been for its intended further use as

dining car to follow the west-going passengers on the Southern Pacific trains that day, no reason for turning the diner would have existed and no accident would have taken place. Whether the dining car was or was not empty was a question of fact. Even should it be held the application of the conclusion or answer to this question of fact is a question of law, that the dining car was engaged in interstate traffic was certainly a question for the jury, and the circuit court of appeals should have so ordered.

The dining car as a matter of law had its interstate character impressed on it when it came from San Francisco. Johnson's freight train had its interstate commerce character as firmly implanted on it from its run from the west. Neither freight train nor dining car had lost the impress or character of interstate traffic as a question of law, and whether the dining car had lost it or had not lost it, was at all events a most material, debatable question and a question of fact; therefore, being material, it should have been submitted to the jury. That this is not an unfair contention may be seen from the opinion of this same circuit court of appeals (Thayer and Sanborn concurring) in the case of *C. M. & St. P. Ry. Co.* v. *Voelker*, 129 Fed. Rep., 522, 528, in which a jury had passed on the question of fact deducible from the killing of a brakeman by reason of defective safety appliances. The court said in part: Voelker case.

> We think there was evidence that the carriage or movement of the coal with which the

Voelker case.

car in question was loaded had not terminated, and that the coal was still actually in transit. *The evidence contains no suggestion that the car had reached the end of its journey, or that it was to remain indefinitely or for any considerable time on the track* where it was at the time *of the injury, or that the coal was to be* UNLOADED THERE. The inference to be reasonably drawn from the evidence is that the car was then *about to actively continue the journey toward the ultimate destination of the coal which it was carrying.* Whether that was near by or remote is not material, because the shipment had originated in another State and was already impressed with the character of interstate traffic, which would follow it at least until the actual transit ceased.

Defendant was clearly shown to be a common carrier engaged in interstate commerce by railroad, and to be using the car mentioned on its line of railroad in moving interstate traffic, and therefore the branch of the case relating to the condition of the coupler IS controlled by the act of Congress and not by the State statute.

CONTRIBUTORY NEGLIGENCE.

Contributory negligence.

In respondent's brief in the circuit court of appeals a large part thereof is devoted to insisting that the plaintiff was guilty of contributory negligence. Neither the circuit court nor the circuit court of appeals paid any attention to this question, and we feel that it is almost unnecessary for us to do so; but, in order that there may be no misunderstanding on the subject, we wish to call the court's attention to the facts in this

case as showing conclusively that there is no question of contributory negligence involved. Contributory negligence.

The act which Johnson was doing was, as he testified, a thing that he had been required to do hundreds of times before, *and up to the first day of August, as is recognized by the statute, he was compelled to do so at his own risk. There was no other way to couple automatic couplers with link and pin couplers, or automatic couplers of one type with those of another type, except to go between the cars to do it.* This was what swelled the casualties to trainmen, and for more than seven long years after the passage of the law to promote their safety these men, of whom Johnson was a type, uncomplainingly subjected themselves to this danger, with men constantly dropping out of their ranks killed and maimed at the rate of 1 out of every 324 killed and 1 out of 12 injured of those employed in this service of coupling. (See Appendix.)

The law after its passage continued this burden upon them for a period of five years. Without protest they submitted to an extension of two years, and a further extension of seven months, for the railroads—their employers—to do away with the condition which forced them to go between the cars, always looking forward to the time when they should be relieved from this risk. At last relief came and the law was in force; the immunity which the employer had previously enjoyed was done away with. The liability was shifted from the shoulders of the employees to those of their employers.

Johnson was asked on the stand, with relation to the company's rule No. 59: "You knew that was there and promised to obey it?"

A. "Yes, sir; those were the rules handed me by the defendant company." (Record, p. .17)

Rules.

Of course, he knew the rule, which if observed would have stopped the wheels of commerce all over the land, and which was necessarily disobeyed thousands of times a day all over this vast transcontinental system. But mark what he said, voicing what he and every one of his fellow trainmen knew, "*I was not forced to go in any more than that I knew the consequences if I did not do the work I was told to do.*" (Record, p. 15.) Nor was this condition singular to Johnson. It was the general requirement of all railroad men in the United States that they should couple cars together by means of a link and pin, and, as we have previously shown in this brief, the danger attached to the use of the ordinary link and pin had been increased by requiring trainmen to couple cars together, which were equipped with the so-called automatic coupler, by means of a link and pin where the type of couplers was not the same. This requirement was so common and so universally complied with that it certainly can not be said that by undertaking to make such a coupling Johnson was doing something which an ordinarily prudent man would quit the service rather than do. As we understand the law, that is the test of contributory negligence; it is the attempt by a person to do some act which an ordinarily prudent man would refuse to do.

There is no suggestion in the testimony that Johnson did the coupling in any careless or reckless manner; on the contrary, he testified that he undertook to do it in exactly the same way that he had always done it before. So that there is nothing about either the act itself, or the method in which he undertook to perform it, which would justify any court in saying that Johnson was guilty of contributory negligence. It is said that the act was dangerous, that Johnson testified it was dangerous, and that he knew it was dangerous. That is true. Of course, it was dangerous to go between the cars, that is why the act of Congress was passed. But that does not create a condition authorizing the court to say that Johnson was guilty of contributory negligence in undertaking to do it. Every man who goes upon a train of cars knows that he is going into danger when he does so, but he can not be said to be guilty of contributory negligence because he does so. As was stated in the Voelker case, heretofore cited, the road had no right to create a condition which compelled a man to put his body between the cars.

Risk shifted by safety appliance act.

Nor can it be said that he violated the rules of the company by going in there. The rules had to be violated by somebody or the business of the company in that particular case would have been left undone. And besides it was the company that instructed him to violate the rules. In Utah the conductor of a train is the company. (Utah R. S., 1342 and 1343.)

Utah statute.

§ 1342. All persons engaged in the service of any person, firm, or corporation, foreign or

Utah statute.

domestic, doing business in this State, who are intrusted by such person, firm, or corporation as employer with the authority of superintendence, control, or command of other persons in the employ or service of such employer, or with the authority to direct any other employee in the performance of any duties of such employee, are vice principals of such employer and are not fellow servants.

SEC. 1343. All persons who are engaged in the service of such employer, and who, while so engaged, are in the same grade of service and are working together at the same time and place and to a common purpose, neither of such persons being entrusted by such employer with any superintendence or control over his fellow employees, are fellow servants with each other: *Provided*, That nothing herein contained shall be so construed as to make the employees of such employer fellow servants with other employees engaged in any other department of service of such employer. Employees who do not come within the provisions of this section shall not be considered fellow servants.

And it was by the conductor's orders that he went in to couple these cars together.

It is admitted by the answer that it was the act of the company.

This is not contributory negligence.

Carson v. *So. R. R.* (46 S. E., 525).

The judgment below should be reversed, with an order for trial *de novo*, and the safety appliance act reinstated by this court.

Respectfully submitted.

W. L. MAGINNIS,
L. A. SHAVER,
JOHN M. GITTERMAN,
Attorneys for Petitioner.

Reference is made to the Third, Fourteenth, Fifteenth, and Sixteenth Annual Reports of the Interstate Commerce Commission; for the year 1889, page 294, etc.; for the year 1900, page 76, etc.; for the year 1901, page 62, etc.; and for the year 1902, page 57, etc.

Also to the statistical reports of the statistics of the Interstate Commerce Commission, years 1890 to 1903, inclusive.

Also to reports of National Association of State Railroad Commissioners:

Resolution requiring M. C. B. couplers. (Proceedings 1890, p. 65.)

Resolution requiring all cars used in interstate commerce to be supplied with automatic couplers and air brakes after January 1, 1893. (Proceedings 1890, p. 67.)

Resolution appointing committee of five to urge upon Congress the imperative need of action calculated to hasten and insure the equipment of freight cars throughout the country with uniform automatic couplers and air brakes. (Proceedings 1891, p. 126.)

Resolution appointing a committee of five to draft a bill to be submitted to Congress requiring train brakes and uniform automatic couplers on freight cars and driving-wheel brakes on locomotives. (Proceedings 1891, p. 129.)

Discussion as to the need of uniformity and interchangeability in couplers. (Proceedings 1891, pp. 130–146.)

Report of committee on safety appliances, with proposed bills requiring uniform couplers and train brakes. (Proceedings 1892, pp. 150–180.)

Resolution directing committee on safety appliances to urge upon Congress the immediate passage of such bill as may most effectually insure the equipment of freight cars throughout the country with uniform automatic couplers and train brakes, and the equipment of locomotives with driving-wheel brakes. (Proceedings 1892, p. 178.)

Resolution appointing committee to investigate types, devices, and methods for coupling, and report such facts and recommendations as they may deem proper and conducive to a universal adoption and use of a uniform type of coupler. (Proceedings 1893, pp. 26–40.)

Report of committee on safety appliances. (Proceedings 1893, p. 20.)

Remarks on safety appliances. (Proceedings 1894, pp. 60–61.)

Remarks on safety appliances. (Proceedings 1895, p. 20.)

Discussion on safety appliances. (Proceedings 1896, p. 89.)

APPENDIX.

Statement showing number of trainmen(a) killed and injured on account of coupling and uncoupling cars.

[Compiled by the statistician of the Interstate Commerce Commission.]

Year ending June 30—	Number of trainmen on June 30.	Killed.	Injured.
1890	153,235	265	6,078
1891	160,138	288	7,155
1892	169,260	253	7,766
1893	179,636	310	8,758
1894	160,083	181	5,539
1895	157,731	189	6,077
1896	162,876	157	6,457
1897	161,397	147	4,698
1898	170,708	182	5,280
1899	178,851	180	5,055
1900	191,198	188	3,803
1901	209,043	163	2,377
1902	225,422	141	2,475
1903	253,660	211	3,023

a Enginemen, firemen, conductors, and other trainmen.

Statement showing ratio of casualties with respect to trainmen on account of coupling and uncoupling cars.

Year ending June 30—	Number of trainmen (excepting enginemen and firemen) on June 30.	Number of trainmen employed (excepting enginemen and firemen) to one trainman—	
		Killed.	Injured.
1890	85,247	322	14
1891	89,060	309	12
1892	94,774	375	12
1893	100,496	324	12
1894	88,240	488	16
1895	87,497	463	14
1896	90,263	575	14
1897	88,935	605	19
1898	93,844	516	18
1899	97,729	543	19
1900	104,231	554	27
1901	116,585	715	49
1902	126,458	897	51
1903	144,626	685	48

Comparative summary of railway accidents for the years ending June 30, 1903, to 1890.

Year.	Employees.		Passengers.		Other persons.		Total.	
	Killed.	Injured.	Killed.	Injured.	Killed.	Injured.	Killed.	Injured.
1903	3,606	60,481	355	8,231	5,879	7,841	9,840	76,553
1902	2,969	50,524	345	6,683	5,274	7,455	8,588	64,662
1901	2,675	41,142	282	4,988	5,498	7,209	8,455	53,339
1900	2,550	39,643	249	4,128	5,066	6,549	7,865	50,320
1899	2,210	34,923	239	3,442	4,674	6,255	7,123	44,620
1898	1,958	31,761	221	2,945	4,680	6,176	6,859	40,882
1897	1,693	27,667	222	2,795	4,522	6,269	6,437	36,731
1896	1,861	29,969	181	2,873	4,406	5,845	6,448	38,687
1895	1,811	25,696	170	2,375	4,155	5,677	6,136	33,748
1894	1,823	23,422	324	3,034	4,300	5,433	6,447	31,889
1893	2,727	31,729	299	3,229	4,320	5,435	7,346	40,393
1892	2,554	28,267	376	3,227	4,217	5,158	7,147	36,652
1891	2,660	26,140	293	2,972	4,076	4,769	7,029	33,881
1890	2,451	22,396	286	2,425	3,598	4,206	6,335	29,027

Statement of conditions in 1893 and 1902.

	1893.	1902.	Increase 1902 over 1893.
Number of cars in freight service	1,013,307	1,546,101	532,794
Number of locomotives in freight service	18,599	23,594	4,995
Number of tons carried	745,119,482	1,200,315,787	455,196,305
Number of tons carried 1 mile	93,588,111,833	157,289,370,053	63,701,258,220
Average number of tons in train	184	296	112
Number of trainmen employed (other than enginemen and firemen), including switchmen, flagmen, and watchmen	146,544	176,942	30,398
Number of tons carried for each trainman employed, etc	5,085	6,784	1,699
Number of tons carried 1 mile for each trainman employed, etc	638,635	888,932	250,297
Number of freight cars for each trainman employed, etc	7	9	2
Number of train miles run for each trainman employed, etc	5,764	5,291	a 473
Number of enginemen and firemen employed	79,140	98,969	19,829
Number of switchmen, flagmen, and watchmen employed	46,048	50,489	4,441
Number of trainmen employed in coupling and uncoupling cars for each one killed (other than enginemen and firemen), including switchmen, flagmen, and watchmen	349	1,060	711
Number of trainmen employed in coupling and uncoupling cars for each one injured (other than enginemen and firemen), including switchmen, flagmen, and watchmen	13	62	49
Number of trainmen killed in coupling and uncoupling cars (other than enginemen and firemen), including switchmen, flagmen, and watchmen, for each 1,000 employed	3	1	a 2
Number of trainmen injured in coupling and uncoupling cars (other than enginemen and firemen), including switchmen, flagmen, and watchmen, for each 1,000 employed	77	16	a 61

a Decrease.

The *above* figures relating to accidents only deal with those occurring in coupling and uncoupling cars.

ACCIDENTS TO TRAINMEN, DUE TO FALLING FROM TRAINS AND ENGINES, FOR THE YEAR ENDING JUNE 30, 1893.

Killed	507
Injured	2,984

Accidents to trainmen due to falling from trains, locomotives, or cars:

Killed	371
Injured	3,821

Jumping on or off trains, locomotives, or cars:

Killed	78
Injured	2,681

for the YEAR ENDING JUNE 30, 1902.

Accidents to trainmen due to falling from trains, locomotives, or cars:

Killed	440
Injured	4,191

Jumping on or off trains, locomotives, or cars:

Killed	101
Injured	3,133

for the YEAR ENDING JUNE 30, 1903.

Statement of equipment in service and equipment fitted with automatic couplers, compiled from the annual reports of the Southern Pacific Company for the years named, ending June 30.

1892.

Item.	Total number at end of year.	Fitted with automatic coupler.	
		Number.	Name.
Locomotives	938	.....	
Cars:			
In passenger service	1,130	1,122	Miller.
In freight service	22,526	147	Miller.
In company's service	752	2	Miller.
Total cars in service	24,408	1,271	

1897.

Locomotives	831	.....	
Cars:			
In passenger service	1,074	1,068	Miller.
In freight service	17,412	10,212	137 Miller, 1,995 Janney, 7,985 California, 95 California and Janney.
In company's service	699	19	16 Miller, 3 California.
Total cars in service	19,185	11,299	

1898.

Locomotives	815	.....	
Cars:			
In passenger service	1,076	1,058	737 Miller hook, 5 Buhoup, 314 Miller.
In freight service	17,160	12,717	1,911 Janney, 8,206 Miller and California, 2,505 California, 95 California and Janney.
In company's service	836	135	25 Miller, 102 Janney, 8 California.
Total cars in service	19,072	13,910	

1899.

Locomotives	865	381	352 California, 29 Janney.
Cars:			
In passenger service	1,113	1,098	54 Janney-Miller, 49 National, 8 B. & B. swing head, 2 California, 6 Buhaup, 980 Miller hook.
In freight service	19,346	17,300	43 Miller hook, 2,708 Janney, 1,869 Lone Star, 2 Delaware, 12,678 California.
In company's service	1,066	440	233 Janney, 10 Miller hook, 197 California.
Total cars in service	21,525	18,838	

Statement of equipment in service and equipment fitted with automatic couplers, compiled from the annual reports of the Southern Pacific Company for the years named, ending June 30—Continued.

1900.

Item.	Total number at end of year.	Fitted with automatic coupler.	
		Number.	Name.
Locomotives	851	723	649 California, 74 Janney.
Cars:			
In passenger service	993	973	8 B. & B. swing head, 5 California, 7 Janney, 7 Janney-Buhoup, 60 Janney-Miller, 770 Miller hook, 114 National, 2 S. P. Co. interchangeable.
In freight service	22,285	21,407	2 Delaware, 13,316 California, 3,148 Janney, 4,679 Lone Star, 37 Miller hook, 225 no record (leased cars).
In company's service	1,299	885	318 California, 480 Janney, 59 Lone Star, 21 Miller hook, 4 Janney-Miller, 3 National.
Total cars in service	24,577	23,265	

SAFETY APPLIANCE ACTS.

Laws of 1893 with amendments.
Laws of 1903.

An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes. (Public No. 113, approved March 2, 1893, amended April 1, 1896.)

Driving-wheel and train brakes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

Automatic couplers.

SEC. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

When carriers may lawfully refuse to receive cars from connecting lines or shippers.

SEC. 3. That when any person, firm, company, or corporation engaged in interstate commerce by railroad shall have equipped a sufficient number of its cars so as to comply with the provisions of section one of this act, it may lawfully refuse to receive from connecting lines of road or shippers any cars not equipped sufficiently, in accordance with the first section of this act, with such power or train brakes as will work and readily interchange with the brakes in use on its own cars, required by this act.

Grab irons and handholds.

SEC. 4. That from and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, and it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars.

Standard height of drawbars for freight cars.

SEC. 5. That within ninety days from the passage of this act the American Railway Association is authorized hereby to designate to the Interstate Commerce Commission the standard height of drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the centers of the drawbars, for each of the several gauges of railroads in use in the United States, and shall fix a maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars. Upon their determination being certified to the Interstate Commerce Commission, said commission shall at once give notice of the standard fixed upon to all common carriers, owners, or lessees engaged in interstate commerce in the United States by such means as the commission may deem proper. But should said association fail to determine a standard as above provided, it shall be the duty of the Interstate Commerce Commission to do so, before July first, eighteen hundred and ninety-four, and immediately to give notice thereof as aforesaid. And after July first, eighteen hundred and ninety-five, no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard above provided for.

Penalty for violation of the provisions of this act.

SEC. 6. (*As amended April 1, 1896.*) That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge: *Provided*, That nothing in this act contained shall shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs.

Duty of United States district attorney.

Duty of Interstate Commerce Commission.

Exceptions to the act.

Power of Interstate Commerce Commission to extend time of carriers to comply with this act.

SEC. 7. That the Interstate Commerce Commission may from time to time upon full hearing and for good cause extend the period within which any common carrier shall comply with the provisions of this act.

Employees not deemed to assume risk of employment.

SEC. 8. That any employee of any such common carrier who may be injured by any locomotive, car, or train in use in contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge.

NOTE.—Prescribed standard height of drawbars: Standard-gauge roads, 34½ inches; narrow-guage roads, 26 inches; maximum variation between loaded and empty cars, 3 inches.

An Act to amend an act entitled "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes, and for other purposes," approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six. (Public No. 133, approved March 2, 1903.)

Safety appliance act of Mar. 2, 1893, as amended by act of Apr. 1, 1896, shall apply in Territories and District of Columbia.

Provisions of safety appliance acts as to couplers shall apply in all cases when couplers are brought together.

Safety appliance act shall apply to all equipment of any railroad engaged in interstate commerce.

Exceptions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions and requirements of the Act entitled "An Act to promote the safety of employees and traverlers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes," approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six, shall be held to apply to common carriers by railroads in the Territories and the District of Columbia and shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type, and the provisions and requirements hereof and of said Acts relating to train brakes, automatic couplers, grab irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith, excepting those trains, cars, and locomotives exempted by the provisions of section six of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, or which are use upon street railways.

Power or train brakes on not less than 50 per cent of cars in trains shall be used and operated.

SEC. 2. That whenever, as provided in said Act, any train is operated with power or train brakes, not less than fifty per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said fifty per centum shall have their brakes so used and operated; and, to more fully carry into effect the ob-

Commission may increase minimum percentage of power or train-brake cars to be used.
Penalty for violating this section.

jects of said Act, the Interstate Commerce Commission may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid; and failure to comply with any such requirement of the said Interstate Commerce Commission shall be subject to the like penalty as failure to comply with any requirement of this section.

Act effective Sept. 1, 1903.
Provisions, powers, duties, requirements, and liabilities specified in act of Mar. 2, 1893, and act of Apr. 1, 1896, apply to this act.

SEC. 3. That the provisions of this Act shall not take effect until September first, nineteen hundred and three. Nothing in this Act shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any United States district attorney from any of the provisions, powers, duties, liabilities, or requirements of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six; and all of the provisions, powers, duties, requirements and liabilities of said Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, shall, except as specifically amended by this Act, apply to this Act.

Copies of these Acts will be furnished upon application.

EDW. A. MOSELEY,
Secretary Interstate Commerce Commission.

O